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No. _____

United States Supreme Court
October Term 1993

State of California,

Petitioner.

Jose Ronillo Abogado LUCERO,
Jimmie JOHNSON,
WALNUT PROPERTIES, INC.,
a California Corporation,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Seven

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May retained (not court-appointed) defense counsel in a state misdemeanor criminal prosecution obtain public payment of his fees pursuant to 42 U.S.C. § 1988 in defending that state criminal action when that same attorney has earlier unsuccessfully sought similar publicly funded "criminal fees" pursuant to California's own statutory version of 42 U.S.C. § 1988 and been denied such fees as against state public policy?

2. Did Congress intend 42 U.S.C. § 1988 to apply to attorney fees for retained counsel who defend ordinary state criminal defendants?

3. Doesn't the immunity of Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96

S.Ct.984], which as a matter of federal public policy protects state prosecutors from fiscal intimidation by criminal defendants, likewise protect such state prosecutors from federal fiscal intimidation pursuant to 42 U.S.C. § 1988 as well?

4. Even if the common law had no immunity against injunction, a remedy which was never attempted hereinbelow, must we construe 42 U.S.C. § 1988 "statutory barratry" (public funding of private litigation--also contrary to common law) to allow fiscal intimidation of public prosecutors for their acts done within their "core immunity," i.e. the initiation of criminal litigation?

5. May a state criminal prosecutor be deemed to have been "successfully sued" pursuant to 42

U.S.C. § 1983 (so as to allow attorney fees pursuant to 42 U.S.C. § 1988) simply by virtue of a state criminal defense counsel's demurrer to state criminal charges, who thereafter pursues his unsuccessful criminal demurrer into higher state appellate courts in that criminal case, but without suing that criminal prosecutor (or the latter's municipal employer) separately, without naming the municipal prosecutor as a defendant in a civil action (under § 1983 nor any other statute), and without adequate notice to the prosecutor that the latter is in fact "being sued" as a civil defendant pursuant to 42 U.S.C. § 1983?

6. Doesn't it violate the state prosecutor's federal "due process/fairness/notice" to learn for the first time at the conclusion of lengthy state criminal

litigation over the sufficiency of the state criminal accusatory pleading, beginning in the inferior municipal court where the prosecutor was the clear criminal "plaintiff" representing the State of California and the named criminal defendants the "defendants" in that criminal matter, and ending finally in the state supreme court where the prosecutor "plaintiff" won clear victory over these named criminal "defendants," to learn to the prosecutor "plaintiff's" great surprise that the prosecutor wasn't a "plaintiff" at all in this litigation, but was in fact a federal civil "defendant" in an unpleaded and unproved 42 U.S.C. § 1983 action, with the criminal defendants being somehow civil "plaintiffs" pursuant to that federal statue so as to allow them attorneys fees under 42 U.S.C. § 1988?

7. If, as herein, ordinary retained criminal defense counsel (presumably already paid a retainer fee up-front by their non-indigent criminal clients) may obtain new and duplicate attorneys' fees--this time at state public expense pursuant to 42 U.S.C. § 1988 where, as herein, it is expressly contrary to state public policy to allow it under state law--does that not erroneously exalt 42 U.S.C. § 1988 into a de facto "federal repeal" of every state, federal, and territorial "court appointment" statute which limits payment of public fees solely to those criminal defense attorneys appointed by the court, authorized by state statute, and disbursed according to state procedures?

8. May criminal defendants be deemed "prevailing parties" under 42 U.S.C. § 1988 where they

never pleaded nor proved a violation of § 1983 and where at best they accomplished higher review in state appellate courts merely to sustain their demurrers in the criminal prosecution, but where the state prosecutor simultaneously obtained review in the highest state court overruling all state precedential authority wrongfully interpreting This Court's decision in Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440] to create an erstwhile state "preponderance" standard (50+% porn film exhibition)--a constitutional standard now abolished by virtue of our instant state criminal prosecution--where the state prosecutor substantially altered the legal relationship of the instant parties so as to render state prosecution of adult entertainment theaters easier hereinafter?

9. Assuming purely arguendo application of 42 U.S.C. § 1988 to our instant criminal prosecution, was it not an express "abuse of 42 U.S.C. § 1988" to allow fees instantly on the basis of criminal defendants' hypothetical "victory" on the issue of "single instance" of porn film exhibition, where state law prior to our instant Lucero I state supreme court decision was that a "preponderance"[1]/ (not merely a "single instance") of porn exhibition was exempted from

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[1]/ In the complete absence of any state law defining by number a "preponderance" of porn film exhibition at movie theaters, or the number of porn film exhibitions at a movie theater exhibiting porn films only PART of the time which constitute the constitutional "floor" above which number of porn film exhibitions the theater becomes "adult" for purposes of regulation by our instant porn-zoning ordinance, we have assumed a "partial-porn" movie theater to be allowed 182 days of total porn film exhibition per the normal 365-day calendar year (183 days of porn for a 366-day leap year). Porn film exhibition at a theater 182/365 °of the time would not "preponderate" because less than half of that theater's total movie exhibition. Nor would 183/366--exactly half--of a theater's film exhibition "preponderate," as half is not a "preponderance." See Pringle v. City of Covina, infra.

our porn-zoning ordinance, that is, didn't criminal defense counsel improperly "abandon his client" in favor of his own fee by arguing in favor of "single instance" in hopes of having "any victory at all" which might qualify as possibly prevailing on that issue so as to seek a public attorney fee under § 1988 when counsel ought to have argued for the greatest protection of his clients ("preponderance" or more) rather than the slightest possible ("single instance") protection of movie owners/exhibitors?

THE PARTIES

The parties, as in our typical criminal case, consist of the criminal prosecutor, i.e. the People of the State of California (represented in this matter by the Long Beach Prosecutor's Office,[2]/ which has

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[2]/ Our office, Long Beach Prosecutor, is a criminal misdemeanor office prosecuting state and local misdemeanor crimes committed within the City of Long Beach.

"The Government Code has vested crime-charging power in the public prosecutor . . . . . With limited exceptions, the public prosecutor in California is the district attorney. Each district attorney has jurisdiction over all felonies committed within his county and over misdemeanors committed in unincorporated areas . . . . . As a practical matter, though, most municipalities contract with the district attorney to prosecute their misdemeanors. Only a few of the larger southern California cities currently have their own city prosecutors. Further, the attorney general has jurisdiction over certain types of crimes . . ., but this jurisdiction is very limited in practice.

The power to charge is the most important power possessed by the district attorney. It is important because it gives the district attorney the power to select not only who will be charged with a particular crime, but also who will not be charged.

Prosecutors have a great deal of discretion in this crime-charging function. Charging discretion takes three basic forms: (1) evidentiary sufficiency--a determination of whether the evidence warrants prosecution; (2) charge selection--a determination of the appropriate charge or charges; and (3) discretion not to prosecute--a determination of whether there is an alterative to formal criminal prosecution. Each of these three basic forms of prosecutorial discretion covers a range of subissues and collateral issues."

4-5, our emphasis.

"The existence of judicially uncontrolled prosecutorial discretion has long been recognized by California courts."

6, our emphasis.

James I. K. Knapp, Ephraim Margolin, Nicholas C. Arguimbau (authors), John Bishop (ed. for CEB), PROSECUTORIAL DISCRETION (Berkeley, Regents of the University of Calif.,

independent city charter authority to prosecute state and local misdemeanors committed by criminal defendants within the city limits of Long Beach, California), opposed instantly by the three (3) joint-defendants herein, all of whom are owners or employees of the Lakewood Theater, a movie theater exhibiting BOTH porn and non-porn movies within the city limits of Long Beach, California.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
THE PARTIES	viii
TABLE OF CONTENTS	x
TABLE OF AUTHORITIES	xv
CITATION TO OFFICIAL REPORTS BELOW	xix
JURISDICTIONAL STATEMENT	xxi
STATUTE INVOLVED	xxii

1979).

STATEMENT OF THE CASE 1

STAGE WHEREIN ISSUE RAISED 14

ARGUMENT 14

I 14

IT REMAINS CONTRARY TO FEDERAL PUBLIC POLICY TO SHIFT VIA 42 U.S.C. § 1988 ATTORNEY FEES FROM NAMED NON-INDIGENT CRIMINAL DEFENDANTS TO THE PUBLIC CRIMINAL PROSECUTOR WHERE THESE SAME ATTORNEYS HAVE UNSUCCESSFULLY ATTEMPTED THE IDENTICAL TACTIC TO RECOVER NON-APPOINTED "CRIMINAL FEES" FOR REPRESENTING NON-INDIGENT CRIMINAL CLIENTS PURSUANT TO CALIFORNIA'S EQUIVALENT OF 42 U.S.C. § 1988, WHEREIN THE STATE APPELLATE COURT DETERMINED THAT SUCH UNAUTHORIZED "CRIMINAL FEES" WOULD BRING "TOTAL CHAOS" TO CALIFORNIA'S CRIMINAL JUSTICE SYSTEM

II 29

CONGRESS NEVER INTENDED 42 U.S.C. § 1988 TO APPLY TO ATTORNEY FEES FOR RETAINED COUNSEL WHILE DEFENDING ORDINARY STATE CRIMINAL DEFENDANTS

III 37

THE IMMUNITY OF IMBLER V. PACHTMAN, WHICH AS A MATTER OF FEDERAL PUBLIC POLICY PROTECTS STATE PROSECUTORS FROM FISCAL INTIMIDATION BY CRIMINAL DEFENDANTS,

LIKEWISE PROTECTS THOSE SAME STATE PROSECUTORS FROM FEDERAL FISCAL INTIMIDATION PURSUANT TO 42 U.S.C. § 1988 AS WELL

IV 42

EVEN IF THE COMMON LAW HAD NO IMMUNITY AGAINST INJUNCTION, A REMEDY WITHOUT "FISCAL INTIMIDATION" WHICH WAS NEVER ATTEMPTED HEREINBELOW, WE NEED NOT CONSTRUE 42 U.S.C. § 1988 AS GENERAL "STATUTORY BARRATRY" TO OVERRULE THE "AMERICAN RULE" OF ATTORNEY'S FEES

V 51

IT VIOLATED THE STATE PROSECUTOR'S FEDERAL "DUE PROCESS/FAIRNESS/NOTICE" TO LEARN FOR THE FIRST TIME AT THE CONCLUSION OF LENGTHY STATE CRIMINAL LITIGATION OVER THE SUFFICIENCY OF THE STATE CRIMINAL ACCUSATORY PLEADING, BEGINNING IN THE INFERIOR MUNICIPAL COURT WHERE THE PROSECUTOR WAS THE CLEAR CRIMINAL "PLAINTIFF" REPRESENTING THE STATE OF CALIFORNIA AND THE NAMED CRIMINAL DEFENDANTS THE "DEFENDANTS" IN THAT CRIMINAL MATTER, AND ENDING FINALLY IN THE STATE SUPREME COURT WHERE THE PROSECUTOR "PLAINTIFF" WON CLEAR VICTORY OVER THESE NAMED CRIMINAL "DEFENDANTS," TO LEARN TO THE PROSECUTOR "PLAINTIFF'S" GREAT SURPRISE THAT THE PROSECUTOR WASN'T A "PLAINTIFF" AT ALL IN THIS LITIGATION, BUT WAS IN FACT A FEDERAL CIVIL "DEFENDANT" IN AN

UNPLEADED AND UNPROVED 42 U.S.C. § 1983 ACTION, WITH THE CRIMINAL DEFENDANTS BEING SOMEHOW CIVIL "PLAINTIFFS" PURSUANT TO THAT FEDERAL STATUE SO AS TO ALLOW THEM ATTORNEYS FEES UNDER 42 U.S.C. § 1988

VI 57

IF, AS HEREIN, ORDINARY RETAINED CRIMINAL DEFENSE COUNSEL (PRESUMABLY ALREADY PAID A RETAINER FEE UP-FRONT BY THEIR NON-INDIGENT CRIMINAL CLIENTS) MAY OBTAIN NEW AND DUPLICATE ATTORNEY'S FEES--THIS TIME AT STATE PUBLIC EXPENSE PURSUANT TO 42 U.S.C. § 1988 WHERE, AS HEREIN, IT IS EXPRESSLY CONTRARY TO STATE PUBLIC POLICY TO ALLOW IT UNDER STATE LAW--THAT ERRONEOUSLY EXALTS 42 U.S.C. § 1988 INTO A DE FACTO "FEDERAL REPEAL" OF EVERY STATE, FEDERAL, AND TERRITORIAL "COURT APPOINTMENT" STATUTE WHICH LIMITS PAYMENT OF PUBLIC FEES SOLELY TO THOSE CRIMINAL DEFENSE ATTORNEYS APPOINTED BY THE COURT, AUTHORIZED BY STATE STATUTE, AND DISBURSED ACCORDING TO STATE PROCEDURES

VII 59

CRIMINAL DEFENDANTS MAY NOT BE DEEMED "PREVAILING PARTIES" UNDER 42 U.S.C. § 1988 WHERE THEY NEVER PLEADED NOR PROVED A VIOLATION OF § 1983 AND WHERE AT BEST THEY ACCOMPLISHED HIGHER REVIEW IN STATE APPELLATE COURTS MERELY TO SUSTAIN THEIR DEMURRERS IN THE CRIMINAL PROSECUTION, BUT

WHERE THE STATE PROSECUTOR SIMULTANEOUSLY OBTAINED REVIEW IN THE HIGHEST STATE COURT OVERRULING ALL STATE PRECEDENTIAL AUTHORITY WRONGFULLY INTERPRETING THIS COURT'S DECISION IN YOUNG V. AMERICAN MINI THEATRES, INC. TO CREATE AN ERSTWHILE STATE "PREPONDERANCE" STANDARD (50+% PORN FILM EXHIBITION)–A CONSTITUTIONAL STANDARD NOW ABOLISHED BY VIRTUE OF OUR INSTANT STATE COURT LITIGATION--WHERE THE STATE PROSECUTOR SUBSTANTIALLY ALTERED THE LEGAL RELATIONSHIP OF THE INSTANT PARTIES SO AS TO RENDER STATE PROSECUTION OF ADULT ENTERTAINMENT THEATERS EASIER HEREINAFTER

VIII 62

IT WAS EXPRESS "ABUSE OF 42 U.S.C. § 1988" TO ALLOW FEES INSTANTLY ON THE BASIS OF CRIMINAL DEFENDANTS' HYPOTHETICAL "VICTORY" ON THE ISSUE OF "SINGLE INSTANCE" OF PORN FILM EXHIBITION, WHERE STATE LAW PRIOR TO OUR INSTANT LUCERO I STATE SUPREME COURT DECISION WAS THAT A "PREPONDERANCE" (NOT MERELY A "SINGLE INSTANCE") OF PORN EXHIBITION WAS EXEMPTED FROM OUR PORN-ZONING ORDINANCE, THAT IS, CRIMINAL DEFENSE COUNSEL IMPROPERLY "ABANDONED HIS CLIENT" BY ARGUING IN FAVOR OF "SINGLE INSTANCE" IN HOPES OF HAVING "ANY VICTORY AT ALL" WHICH MIGHT QUALIFY AS POSSIBLY PREVAILING ON THAT ISSUE SO AS TO SEEK A PUBLIC ATTORNEY FEE UNDER § 1988 WHEN COUNSEL OUGHT TO HAVE ARGUED FOR THE GREATEST PROTECTION OF HIS CLIENTS

(PREPONDERANCE OR MORE) RATHER THAN THE SLIGHTEST POSSIBLE ("SINGLE INSTANCE") PROTECTION OF MOVIE OWNERS/EXHIBITORS

CONCLUSION 65

TABLE OF AUTHORITIES

Cases — Page

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407 U.S. 25 [32 L.Ed.2 530,
92 S.Ct. 2006] 35

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(9th Cir. 1988) 33, 36

Bravo v. Cabell (1974) 11 Cal.3d 834,
[114 Cal.Rptr. 618,
523 P.2d 658] 17, 22, 29, 34

Butz v Economou (1978) 438 U.S. 478
[57 L.Ed.2d 895, 98 S.Ct. 2894] 55

City of Los Angeles v. Lyons (1983)
461 U.S. 95 [75 L.Ed.2d 675, 103 S.Ct. 1660] 50

Crawford et al. v. Municipal Court,
L.A. Sup. Ct. No. 391086,
appeal dismissed 2d Civ. 67250 3

Gideon v. Wainwright (1963)
372 U.S. 335 [9 L.Ed.2d 799,
83 S.Ct. 792] 35, 58

Hutto v Finney (1978) 437 U.S. 678
[57 L.Ed.2d 522, 98 S.Ct. 2565] 55

Imbler v. Pachtman (1976)
424 U.S. 409 [47 L.Ed.2d 128,
96 S.Ct.984]
. . . . ii, xvii, 13, 17, 25, 39-40,
43, 48, 50, 53, 57

In re Head (1986) 42 Cal.3d 223
[228 Cal.Rptr. 184, 721 P.2d 65] 23

Kentucky v. Graham (1985) 473 U.S. 159
[87 L.Ed.2d 114, 105 S.Ct. 3099] 6

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(1993) 15 Cal.App.4th 784
[19 Cal.Rptr.2d 143]--"depublished"
by order of the California Supreme
Court August 12, 1993 (hereinafter
"Lucero II") . . . . passim

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448 U.S. 1 [65 L.Ed.2d 555,
100 S.Ct. 2502] 31

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Dist. Ct. No. 81-0548 2

Miranda et al. v. Winston,
U.S. Dist. Ct. No. 83-1665 (MCX) . . . 2

Newman v. Piggie Park Enterprises,
Inc. (1968) 390 U.S. 400,
[19 L.Ed.2d 1263,
88 S.Ct. 964, 966] 43

Newman v. Village of Hinsdale (N.D.Ill.E.D, 1984)
592 F.Supp. 1307-1308 32

People v. Superior Court (Lucero)
(1989) 49 Cal.3d 14
[259 Cal.Rptr. 740, 774 P.2d 769]
(hereinafter "Lucero I") . . . . passim

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(1988) ___ Cal.App.3d ___ [244 Cal.Rptr. 502],
vacated by Lucero I 12, 45-46

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[175 Cal.Rptr. 64]
. . . . 15-17, 19-20, 22-25, 33,
37, 41-42, 48, 57-58

Perkins v Cross (8th Cir. 1984) 728 F.2d 1099, 1100
. . . . 33

Pringle v. City of Covina (1981)
115 Cal.App.3d 151
[171 Cal.Rptr. 251]
. . . . vii, 4-6, 9-10, 22, 25, 27

Romberg v. Nichols (9th Cir. 1992) 970 F.2d 512, 521
. . . . 64

Sullivan v. Little Hunting Park,
396 U.S. 229,
[24 L.Ed.2d 391, 90 S.Ct. 400] 49

Texas State Teachers Assn. v.
Garland Independent School Dist.
(1989) 489 U.S. 782
[103 L.Ed.2d 866, 109 S.Ct. 1486] 60

Walnut Properties, Inc. v.
City of Long Beach,
U.S. Dist. Ct. No. 81-942-TJH 3

Walnut Properties, Inc. v.
Long Beach City Council (1980)
100 Cal.App.3d 1018
[161 Cal.Rptr. 411] 3, 4

Walnut Properties, Inc. v. Ussery
(1986) 178 Cal.App.3d 186
[223 Cal.Rptr. 511],
depublished by order of the
California Supreme Court,
June 24, 1986) 3, 9

Young v. American Mini Theatres,
Inc. (1976) 427 U.S. 50
[49 L.Ed.2d 310,
96 S.Ct. 2440] . . . . vi, 1, 9

Statutes

28 U.S.C. § 1257(a) xvi

42 U.S.C. § 1988 . . . . passim

42 U.S.C. § 1983 . . . . passim

Code of Civil Proc. § 904.1(a)(4) 24

Code of Civil Proc. § 1021.5 . . . . 16, 20

Government Code § 821.6 26

Government Code § 820.2 26

Penal Code § 987.2 et seq. 26, 58

Articles

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(West, centennial,
6th, ed., 1990) 51

Joseph R. Grodin, "The Depublication Practice of the California Supreme Court," 72 Cal. L. Rev. 514, 514-515, n. 7, (1984) 5

James I. K. Knapp, Ephraim Margolin, Nicholas C. Arguimbau (authors), John Bishop (ed. for CEB), PROSECUTORIAL DISCRETION (Berkeley, Regents of the University of Calif., 1979). ix

CITATION TO OFFICIAL REPORTS BELOW

Our instant "Appendix" to our present Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California, contains accurate typewritten verbatim copies of our two (2) pertinent state court decisions hereinbelow: (1) our Appendix # 1 is People v. Superior Court (Lucero) (1989) 49 Cal.3d 14 [259 Cal.Rptr. 740, 774 P.2d 769] (recited hereinafter as

"Lucero I," and (2) our Appendix # 2 is Lucero v. Municipal Court (People) (1993) 15 Cal.App.4th 784 [19 Cal.Rptr.2d 143]--"depublished" by order of the California Supreme Court August 12, 1993 (recited hereinafter as "Lucero II"). The latter, Lucero II, is the instant judgment for attorney fees we seek to reverse by this writ. The amount of the fees is no longer the stated $35,000 + $1,773 costs mentioned in the Lucero II judgment, but has now risen to "$85,000" according to recent estimates by Stanley Fleishman,[3]/ leading partner in Fleishman, Fisher & Moest, opposing counsel in both Lucero I and in Lucero II because of their additional efforts to collect the fee from our office during our writ

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[3]/ Mr. Fleishman has stipulated with our office to defer rendering his supplemental fee petition pursuant to 42 U.S.C. § 1988 until after This Court grants or denies our instant Petition for Writ of Certiorari. He agrees with the figure of "$85,000" as "ballpark accurate" for some of his supplemental fees, not including additional fees for prosecution of his § 1988 fee award before This Court.

Mr. Fleishman is being compensated pursuant to § 1988 hereinbelow at the rate of approximately $350 per hour.

review through the California appellate courts.

JURISDICTIONAL STATEMENT

Jurisdiction is sought under 28 U.S.C. § 1257(a) to review the judgment of the California Court of Appeal, Second District, affirming for the first time in the history of California the above-mentioned award of attorney's fees pursuant to 42 U.S.C. § 1988 to retained, non-appointed criminal defense counsel at public expense for the latter's pursuing demurrers to state criminal complaints initiated by our office in the Long Beach Municipal Court, where This Court's decision of Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96 S.Ct.984], grants state prosecutors, such as our office, "absolute immunity" from such fees as a matter of federal public policy, and where Congress never remotely intended 42 U.S.C. § 1988 to pay attorneys for criminal defense in state court misdemeanor prosecutions. We do NOT attack the constitutionality of

42 U.S.C. § 1988, but attack merely the latter's application to our instant state criminal prosecution.

STATUTE INVOLVED

The federal statute upon which the instant awarding of fees at public expense to non-appointed, non-indigent criminal defense counsel is 42 U.S.C. § 1988.[4]/ It was recited in Respondents' moving papers.[5]/

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[4]/ That federal statute states in pertinent part as follows:

> *"(a) Applicability of statutory and common law.*
> *The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title 'CIVIL RIGHTS,'and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.*
>
> *(b) Attorney's fees.*

STATEMENT OF THE CASE

Our instant lengthy litigation with instant Respondent owners of Lakewood Theater over the Long Beach adult entertainment ordinance (hereinafter "porn-zoning" ordinance) commenced in 1977 when Respondent criminal defendants--owners/operators of the "Pussy Cat" chain of porn theaters--purchased the Lakewood Theater in order to exhibit 100% XXX-rated porn movies therein in violation of the Long Beach adult entertainment ordinance, which like the Detroit "scatter" ordinance of Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440],

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In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . . ."

[5]/ Correct copies of Respondents' moving papers below, including their original writ petition in Lucero I (our Appendix # 4), and including the trial court judgment in Lucero I (our Appendix # 5), as well as their original petition for fees (our Appendix # 6), are all included in our instant bound Appendix to this Petition for writ of certiorari.

required such porn theaters NOT to locate within 1,000 feet of each other nor within 1,000 feet of a church or religious structure, nor within 1,000 feet of a public school. Lakewood Theater lay within the 1,000 foot restrictions in both its distance from a religious structure and distance from a public school. There then existed numerous other 100% porn theaters inside the City of Long Beach, including a separate "Pussy Cat" porn theater owned by Defendant-owners herein, which were deemed "grandfathered" exemptions from the Long Beach porn-zoning ordinance because of their prior existence in Long Beach before the enactment of the ordinance in 1977. Thereafter commenced numerous civil lawsuits and appellate litigation[6]/ (usually by instant

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[6]/ The virtually incessant litigation between instant Lakewood Theater owners and the City of Long Beach, mischaracterized by Lucero II--see our Appendix # 2 pp. 43-45--to appear to be city harassment of theater owners, was nothing of the kind. As reflected in our state petition for rehearing in state Court of Appeal below, it was instant theater owners, not the City of Long Beach, which initiated the bulk of that litigation--each time represented by instant attorneys Fleishman, Fisher & Moest.

theater owners--represented by the instant private law

Our instant appellate record shows conclusively that instant Defendant theater-owners "plagued" the City of Long Beach with a constant barrage of lawsuits, most of which were not criminal in nature, hence were not related to our office, nor were we privy to them. Our record reveals no fewer than 5 lawsuits initiated by instant Respondents against this criminal office or the City of Long Beach in connection with their various schemes of porn film exhibition at their Lakewood Theater. (1) Miranda v. Pitchess, U.S. Dist. Ct. No. 81-0548, federal habeas relief denied, summarily reversed and remanded by our Ninth Circuit Court of Appeal in No. 83-5740; (2) the same federal habeas petition again denied, U.S.Dist. Ct. No. 81-9548, appeal dismissed, Ninth Cir. No. 84-5685; (3) Miranda et al. v. Winston, U.S. Dist. Ct. No. 83-1665 (MCX); (4) Walnut Properties, Inc. v. Ussery (1986) 178 Cal.App.3d 186 [223 Cal.Rptr. 511], depublished by order of the California Supreme Court, June 24, 1986) which had named our office, the Long Beach City Prosecutor, as co-defendant to Lakewood Theater owners' unsuccessful civil action for injunctive and declaratory relief (and for attorney's fees) against co-defendant City of Long Beach, creating we contended "collateral estoppel" between our office and these particular Lakewood Theater owners, i.e. the same parties prosecuted criminally in the instant Lucero II, infra; (5) Walnut Properties, Inc. v. City of Long Beach, U.S. Dist. Ct. No. 81-942-TJH, constitutional attack upon the Long Beach porn-zoning ordinance rejected, appeal dismissed U.S. Ninth Cir. No. 81-5732; (6) Walnut Properties, Inc. v. Long Beach City Council (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411], mentioned repeatedly in Lucero II; (7) Crawford et al. v. Municipal Court, L.A. Sup. Ct. No. 391086, appeal dismissed 2d Civ. 67250, instant Respondents' attempted writ of mandate to assume Pringle protection for their 100% porn exhibition scheme at Lakewood Theater. The foregoing is but a partial list of legal actions initiated by instant criminal Defendants against us or the City of Long Beach. Vincent "Miranda" mentioned repeatedly hereinabove was then primary shareholder of Walnut Properties, Inc., often suing in his own name.

firm, Fleishman, Fisher & Moest--against the City of Long Beach, represented NOT by our office, which is purely a criminal prosecutor's office[7]/ housed in the police headquarters building, but by the Long Beach City Attorney's Office--the charter-assigned legal representative of the City of Long Beach, separately housed at city hall.

In 1981 Pringle v. City of Covina (1981) 115 Cal.App.3d 151 [171 Cal.Rptr. 251] decided for the first time in California that only those movie theaters would

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[7]/ There is no connection whatever between the functions of the civil Long Beach City Attorney's office and our instant criminal Long Beach City Prosecutor's office. The head of each respective office is separately elected every 4 years at the Long Beach general municipal election. The two offices are separately housed, separately defined within the Long Beach City Charter, separately funded, separately staffed, and separately administered.

The numerous civil lawsuits by instant criminal defendants against the City of Long Beach, including Walnut Properties, Inc. v. Long Beach City Council (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411]--wherein they might possibly have obtained § 1988 attorney's fees, had they been successful in their litigation, was defended by the City's legal department, the Long Beach City Attorney's Office. Our office was not privy to any of those lawsuits, although named as co-defendant in some of them.

be deemed "adult"--hence subject to such porn-zoning ordinances as ours instantly ONLY if they exhibited porn[8]/ a "preponderance" of the time. Pringle effectively killed all porn-zoning prosecution in California for the physical difficulty and insufficient police resources to monitor all movie theaters all the time to see "how

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[8]/ That is, adult movies, as defined in our Young-based ordinance. People v. Superior Court (Lucero) (1989) 49 Cal.3d 14 [259 Cal.Rptr. 740, 774 P.2d 769], hereinafter " Lucero I," depicts the eventual demise of the Pringle, supra, "preponderance regime" in California.

We have included a correct copy of Lucero I as Appendix item "# 1" to our instant Petition because it was the case wherein instant criminal defense attorneys claim to have "earned" their right to 42 U.S.C. § 1988 attorney's fees hereinbelow, and upon which the instant fee order, Lucero II, was made at the completion of Lucero I.

We have included a correct copy of Lucero v. Municipal Court (People) ___ Cal.App.4th ___ [19 Cal.Rptr.2d 143], "depublished" by order of the California Supreme Court, August 12, 1993, hereinafter "Lucero II," as our Appendix item "# 2." The latter is the judgment of the court for fees we seek to have vacated by this Petition for Writ of Certiorari.

"Depublishing" occurs in California in the "vast majority" of cases "*because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent.*" (Now retired) Justice Joseph R. Grodin, "The Depublication Practice of the California Supreme Court," 72 Cal. L. Rev. 514, 514-515, n. 7, (1984).

often" they exhibited porn movies.[9]/ As soon as the ink was dry on the state Pringle opinion, Respondent owners began exhibiting "partial porn" at Lakewood Theater as reflected in the following stipulations. At our request Long Beach Police commenced its 22 month surveillance of Lakewood Theater, purchasing copies of the movies for use at trial, rather than interfering with movie operations by seizing such movies.[10]/ This 271

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[9]/ Our instant Lucero I has correctly overruled Pringle, reducing the latter's constitutional standard of "preponderant" porn film exhibition to the now lesser standard of Lucero I's newly formulated "regular and substantial course of conduct" standard (cf. Appendix # 1, p, 20, n. 11).

[10]/ We were very sensitive to any claim of "harassment" by criminal Defendants herein, and therefore exercised extreme caution NOT to interfere with the operations of the Lakewood Theater and Defendants'/Respondents' full freedom to select what kinds of movies would be shown and where at Lakewood Theater.

Twelve counts of adult film exhibition, between July 23 and August 19, 1986, were alleged against each of the 3 named defendants, or 36 counts in all. This is plain and conclusive rebuttal to the allegation that our office alleged but a "single instance" of film exhibition in the instant complaints. At no time did we allege but a "single instance" of film exhibition at the Lakewood Theater. We alleged those multiple dates and movies named in the criminal complaints because they were the only occasions when Long Beach Police officers

had sat through the entire movie, taking notes thereon, so as to be able to testify that each movie met the other major requirement of our statute, i.e. that the movies be "characterized by an emphasis upon" the specified anatomical areas and/or sexual activities named in the ordinance. The latter element of our ordinance was never in issue in Lucero I, being implicitly conceded by Defendants' demurrers to our criminal complaints, and expressly stipulated as well. See Stipulation # 1, p. 8, infra.

The police officers had visited the Lakewood Theater on numerous occasions, but without sitting through the entire film, thus rendering them incapable of testifying to the entire content of each adult film. Indeed, the burdensome task of viewing completely each film each day it was exhibited was a prime motivation of our attack upon the Pringle "preponderant use" standard. Not only did our police officers not interfere with the exhibition of the porn movies at the Lakewood Theater, they didn't even seize any of those films for evidence. Rather they purchased each film separately for use as evidence in court. This required additional police time in order to view completely the purchased copy of the films, and compare the contents to confirm they were exactly the same films as exhibited at the Lakewood Theater. Our office was in direct control of police surveillance of the Theater and its film exhibition; we had instructed police scrupulously to avoid any claim of interference with Defendants' First Amendment rights. Nor did police officers intimidate Lakewood Theater personnel, nor seek in any fashion to close the Theater, its porn film exhibitions, nor seize any of its assets of any kind.

Although somewhat outside our appellate record in Lucero I, which was based solely upon our criminal pleadings and Respondents' criminal demurrers, we recite the foregoing facts to show the blatant unfairness of Respondents' instant attempt to characterize their state writ of mandate as somehow a federal 42 U.S.C. § 1983 action, authorizing § 1988 attorney's fees. Had our office truly been faced with a federal § 1983 action, we certainly would have proved the above-

surveillance report by Long Beach police was summarized in the following stipulations entered by the parties in 1983, and which continued unaltered throughout the instant 1986 criminal prosecution:

> *"(1) That the movies represented in People's Exhibit #1, the 271-page surveillance report of the movies exhibited at the Lakewood Theater (generally from May 8, 1981 to March 4, 1983), violated the 'preponderant' exhibition of 'specified sexual activities' and/or 'specified anatomical areas' of our instant zoning ordinance.*
>
> *(2) That the 'adult' movies were shown on consecutive 3-day weekends through most of the nearly 2 year period of surveillance.*
>
> *(3) That the exhibition pattern at the theater changed for approximately 2*

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mentioned facts in order to defeat any claim of factual interference with the Theater's federal First Amendment rights.

Indeed, we think it violates our federal due process to allow the instant attorney's fees where no § 1983 action was properly pleaded nor proved, and where, ignoring legal immunity, the People's proof of no factual violation of § 1983 was never allowed nor called for below. At a minimum, a federal § 1983 claimant must plead and prove his § 1983 claim before § 1988 attorney's fees may occur. Kentucky v. Graham (1985) 473 U.S. 159 [87 L.Ed.2d 114, 105 S.Ct. 3099].

weeks in June-July, 1981, wherein 3-day weekend adult exhibition changed to a 7-day weekly schedule of alternate adult, non-adult film exhibition at the theater.

(4) That 'recently' (per the record of September 22, 1983) the adult/non-adult film exhibition schedule was altered to show 100% adult films in one of the 2 interior screens[11]*/ while simultaneously exhibiting non-adult, longer running films in the other interior screen at the Lakewood Theater.*[12]*/*

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[11]/ Emphasis added. Notice this 100% porn film exhibition at one of its two interior movie screens rendered the Lakewood Theater a "100% porn theater" (at at least one of its screens) despite Pringle "preponderance" protection, thus triggering all the deleterious "secondary effects" of 100% porn exhibition condemned in Young v. American Mini Theatres, Inc., supra.

[12]/ Respondent theater owners' civil action against co-defendants Long Beach police chief, Charles Ussery AND the named Long Beach Prosecutor, John A. Vander Lans in Walnut Properties, Inc. v. Ussery, supra, was undertaken in order to validate this stipulated porn exhibition scheme at our instant Lakewood Theater, which on its face appeared to be a "fraud" against This Court's Young, supra, (100% porn exhibition) decision by use of state court Pringle's supposed "partial porn" context. Is a theater "partial porn" under Pringle when it exhibits porn 100% of the time at one of its screens?

We mention Respondents' foregoing "Pringle fraud" herein to show that even if our instant Lucero I criminal complaints had alleged Pringle "preponderance"--which they did not, so that we might attack Pringle directly--even so we might have won Lucero I WITHOUT striking down Pringle, if merely we had obtained state appellate recognition and

(5) That the total adult film exhibition time never exceeded the non-adult film exhibition time of both interior screens at the theater."

On one occasion during the persistent stipulation # (4) exhibition regime[13]/ recited above police reported

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rejection of "Pringle fraud" in this stipulated porn exhibition scheme, which is in fact 100% porn exhibition attempting to disguise itself as "partial porn" exhibition under Pringle.

[13]/ That stipulated # 4 exhibition regime continued unabated from 1983 throughout the state Court of Appeal review and until the initial grant of review by our state supreme court in Lucero I, November 18, 1987, whereupon Respondent owners--apparently seeing the future legal handwriting on the wall--unilaterally ceased exhibiting porn films at all, eventually leased Lakewood Theater to a third party operator, who commenced exhibiting 100% general release (non-porn) films. Eventually the Lakewood Theater site was sold, demolished, and new construction erected thereat--all during the pendency of Lucero II. Office buildings now occupy the space once occupied by Lakewood Theater.

We mention the foregoing to rebut conclusively Respondents' claim to have obtained "an injunction" allowing exhibition of porn films against us in Lucero I. At the time Respondents' attorneys filed their request for attorney's fees pursuant to 42 U.S.C. § 1988 on December 18, 1989, effectively initiating their Lucero II, Respondents no longer held a beneficial interest in Lakewood Theater, and if so, had abandoned by voluntary conduct their exhibition of all porn ("adult") movies at that theater, thus rendering them factually incapable of obtaining such "an injunction." See our note # 69, infra.

seeing the non-porn movie erroneously akilter, off-screen, and unviewable by theater patrons, but it continued to run in that fashion for several hours because, typically, there were no patrons in that non-porn portion of the theater to complain, anyway.

Please notice that our instant criminal charges reflect offenses occurring in July and August, 1986. For almost 3 years after the 1983 date mentioned in stipulation # 4, quoted hereinabove, and continuing consistently thereinafter during the pendency of Lucero II, our office patiently bided our time restrained by Pringle's death-dealing "preponderant" exhibition standard while Respndents continued (stipulation # 4) to exhibit 100% porn at one of its two interior movie screens at Lakewood Theater. For more than 5 years--1981 to the filing of our instant criminal complaints hereinbelow in 1986, and almost 2 more years to the initial grant of hearing by our supreme court in Lucero

I, November 18, 1987, cf. People v. Superior Court (Lucero) (1988) ___ Cal.App.3d ___ [244 Cal.Rptr. 502],[14]/ vacated by Lucero I, we were constrained from prosecuting and/or restrained from interfering with Lakewood Theater porn film exhibition by Respondents herein because of Pringle.

In November, 1987 upon grant of review by our state supreme court, Lakewood Theater voluntarily ceased all exhibition of porn films.[15]/ Soon Respondent owners leased Lakewood Theater to third parties, who commenced 100% non-porn film exhibition therein. Eventually, Respondent owners sold the realty upon which Lakewood Theater sat. New owners of that site demolished Lakewood Theater, and constructed office

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[14]/ Review was granted May 26, 1988, a second time by our state supreme court, after this Court of Appeal decision. Initially, November 18, 1987, our supreme court had granted review, directing the matter straight to our Court of Appeal for decision. See the initial state Court of Appeal recitation of facts and times quoted herein at our note # 65.

[15]/ See our note # 69, infra.

buildings at its erstwhile location. Our office never proceeded to trial in Long Beach Municipal Court upon the original criminal charges, for we deemed such prosecution now moot.

December 18, 1989, Respondents initiated Lucero II with their instant request for attorney's fees pursuant to 42 U.S.C. § 1988. Respondents' attorneys were awarded $35,000 + $1,773 costs mentioned in the Lucero II judgment, which has now risen to "$85,000"[16]/ for additional legal effort (i.e. Lucero II) to collect those fees, yet does not include additional fees for efforts before This Court to claim those fees.[17]/

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[16]/ See our note # 3, infra.

[17]/ Should we be unsuccessful before This Court, we expect Respondents' fees to be well in excess of $100,000. The latter sum approximates the annual earnings of two deputy city prosecutors for the City of Long Beach, and represents an unanticipated and impossible budgetary foresight for our office.

We contend that Imbler, infra, "core immunity" protects our prosecutor's office from having to anticipate such devastating and surprising fiscal penalty by criminal defense counsel.

STAGE WHEREIN FEDERAL QUESTION RAISED

Respondents hereinbelow "mentioned" by a reference or two the issue of "attorney's fees" pursuant to 42 U.S.C. § 1988 in their original writ papers in Lucero I as well as explicitly afterwards in their fee petition commencing their Lucero II. See our instant Appendix pp. 85-86, 88, 91-92, 102, 104-105, 116. Our criminal office simply ignored them because of Fogelson, infra, Imbler immunity, and the absence of Congressional intent to apply 42 U.S.C. § 1988 to defense of state criminal prosecutions.

ARGUMENT

I

IT REMAINS CONTRARY TO FEDERAL PUBLIC POLICY TO SHIFT VIA 42 U.S.C. § 1988 ATTORNEY FEES FROM NAMED NON-INDIGENT CRIMINAL DEFENDANTS TO THE PUBLIC CRIMINAL PROSECUTOR WHERE THESE SAME ATTORNEYS HAVE UNSUCCESSFULLY ATTEMPTED THE IDENTICAL TACTIC TO RECOVER NON-APPOINTED "CRIMINAL FEES" FOR REPRESENTING NON-INDIGENT CRIMINAL CLIENTS PURSUANT TO CALIFORNIA'S

EQUIVALENT OF 42 U.S.C. § 1988, WHEREIN THE STATE APPELLATE COURT DETERMINED THAT SUCH UNAUTHORIZED "CRIMINAL FEES" WOULD BRING "TOTAL CHAOS" TO CALIFORNIA'S CRIMINAL JUSTICE SYSTEM

The very same lawyers who have been instantly "successful" on the basis of what we shall call herein "criminal blinders,"[18]/ i.e. 42 U.S.C. § 1988 in the state criminal context, are the identical lawyers who were "laughed out" of state[19]/ court for unsuccessfully

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[18]/ That is, "blinding" a state court to the criminal nature of this litigation, thereby avoiding Fogelson's fee preclusion, but accomplishing the same illegality forbidden in Fogelson by current use of federal § 1988 in the state criminal context.

Decision by This Court that 42 U.S.C. § 1988 MAY NOT be used in our instant criminal context will end such "sham supremacy" of federal law and "criminal blinders" in state criminal prosecutions.

Criminal defense counsel's seeking "federal supremacy" in § 1988 is a "sham" not because § 1988 is fraudulent in any sense at all, but because state criminal attorneys fraudulently "pretend" to assert "federal supremacy" in § 1988 when in fact they're simply trying to avoid the plain attorney fee preclusion of Fogelson.

[19]/ The question here is MAY a non-appointed state criminal defense lawfirm, which cannot as against state public policy recover public-funded fees for representing non-indigent, defendants in state criminal actions NEVERTHELESS recover those fees upon the "sham supremacy" basis of federal statutes, i.e. 42 U.S.C. § 1988?

attempting this same "criminal fees" tactic pursuant to California's own "private attorney general statute," Code of Civil Proc. § 1021.5.[20]/ We think it against federal public policy (hence against § 1988) for criminal defense

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We assert herein that a state judge MUST REFUSE, i.e. has no discretion to award, attorney's fees pursuant to 42 U.S.C. § 1988, where state public policy already exists for denying such fees in the identical state context. No state judge may recognize nor state criminal defendant be allowed to assert a criminal defendant's "sham supremacy" of the federal fee statute where the state fee statue has already determined such a fee to bring "total chaos" to the state criminal justice system.

For this reason alone the fee award hereinbelow must be reversed and a clear principle enunciated by This Court to the effect that state public policy will not be allowed to be frustrated by criminal defense counsel's artfully pleading such criminal fee motions in terms of the federal, rather than the plainly improper state fee statute.

[20]/ C.C.P. § 1021.5 reads in pertinent part as follows:

> *"Upon motion, a court may award attorney's fees to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."*

counsel to be allowed to bring "total chaos"[21]/ to our state's criminal justice system by their simple stratagem of adding the magical phrase, "42 U.S.C. 1983,"[22]/ to the caption of their document seeking state review of their criminal demurrers, a state review which did NOT sound in 42 U.S.C. § 1983, in any event,[23]/ but which

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[21]/ See Fogelson, infra.

[22]/ See our separately filed Appendix, items ## 4, 5, and 6 (Appendix page references infra, at our text, p. 14, reflecting the sparse, but existing, "federal" allegations of our supposed misconduct hereinbelow.

We think at a minimum Respondents were required to give us adequate "notice" of such federal allegations by explaining in their original moving papers why our absolutely pervasive Fogelson and/or Imbler immunities were no longer extant herein, so that we might take them seriously.

[23]/ This lack of meaningful "notice" informing us of pending FEDERAL claims NEVER pleaded nor proved pursuant to federal requirements of § 1983, constitutes clear violation of our "due process," treated herein at our Point V.

As we note in our discussion of Bravo v.Cabell, post, our public prosecutor's office was correct to regard criminal defendants' pretrial writ review of our criminal pleadings as purely CRIMINAL in nature no matter what the "civil" manner in which that criminal review was undertaken. That "criminal review" occurred as defense in a criminal prosecution, NOT as independent initiation of "civil rights" actions pursuant to 42 U.S.C. § 1983 nor any other principle of federal law. These criminal defendants, therefore, pursued NONE of the

was undertaken merely to review[24]/ the sufficiency of the criminal complaints. The leading case, brought by our instant attorneys, Fleishman, Fisher & Moest, is People v. Fogelson (1981) 120 Cal.App.3d 858 [175 Cal.Rptr. 64]:

> *"Petitioner and appellant Fogelson seeks a determination that section 1021.5 of the Code of Civil Procedure may, in a proper case, be used to pay the attorney's fees incurred by a defendant in a criminal action. . . .*

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independent purposes Congress intended to protect by either § 1983 nor § 1988.

This entire fee litigation (Lucero II) was nothing but criminal defendants' studious effort to (mis)characterize our litigation as "civil" when in fact it has remained "criminal" throughout. Fogelson correctly saw the criminal nature of that municipal prosecution. Instantly, Lucero II has donned "criminal blinders" to avoid looking at the criminal nature of our municipal prosecution herein. We seek the assistance of This Court properly to strip our instant state appellate courts of their "criminal blinders" in "federalizing" the fee award (§ 1988) to the "total chaos" of state criminal justice.

[24]/ If § 1988 fees be allowed in our instant review of criminal pleadings, there is no principled way to prevent § 1988 fees from being awarded any time a criminal defendant "prevails" (§ 1988) on any motion, any trial, or any appeal. Our state criminal justice system is surrounded by a panoply of federal constitutional principles, any one of which will likely have been violated whenever a criminal defendant be successful pretrial, at trial, or post trial.

Since we are quite convinced that the Legislature never intended section 1021.5 to apply to attorney's fees incurred in the defense of a criminal prosecution,[25]/ we shall not waste any time on the question of procedure . . . .

We have examined all available legislative materials and can assert with confidence that nothing so much as winks at the possibility that section 1021.5 might be applied to attorney's fees incurred in the defense of criminal cases.[26]/ Nor have we found a single criminal case among those which apparently triggered the legislation [citing This Court's Alyeska Pipeline Co. v. Wilderness Society, which necessarily includes FEDERAL law as well!]. Finally a case to which section 1021.5 is much indebted as far as its precise language is concerned--La Raza Unida v. Volpe [another federal case, please notice]--is, of course, a civil case.

In sum: nothing we have found supports petitioner on the basic question whether the Legislature intended section 1021.5 to apply to

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[25]/ We likewise are identically convinced that Congress never remotely intended 42 U.S.C. § 1988 to apply to attorney's fees in criminal cases. Nor have Respondents recited EVEN ONE example of § 1988 fees being awarded in a criminal PROSECUTION (state or federal). "Prisoners' conditions" injunctions (e.g. Hutto v. Finney) obviously don't count, as the latter are not criminal PROSECUTIONS.

For this reason alone the instant judgment must be reversed and the clear federal guideline established that § 1988 fees may NOT be recovered in ordinary defense of state criminal prosecutions.

[26]/ We assert the same regarding 42 U.S.C. § 1988.

cases such as petitioner's.

. . . Nothing would be clearer than that chapter 6 addresses only the question of costs and attorney's fees in civil actions. Were one to follow petitioner's suggestion and interpret the word 'action' whenever it appears in chapter 6 to include criminal prosecutions, total chaos would result.[27]*/*

In brief the context in which section 1021.5 appears would make it a highly imaginative exercise of judicial legislation to apply it to criminal cases. [Citing 4 state cases.] The legislative intent being plain,[28]*/ we simply have no occasion to discuss the many considerations of public policy which petitioner advances in favor of legislation which would reimburse his attorney. However desirable such legislation might be, section 1021.5 is not it.*[29]*/*

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[27]/ We respectfully suggest that the same "total chaos" will result if 42 U.S.C. § 1988 be applied to state court criminal prosecutions.

[28]/ We think it equally "plain" respecting 42 U.S.C. § 1988. And, as in Fogelson, "that ends" our inquiry and decides our instant case.

It was not for our instant state Court of Appeal to construe FOR ITSELF and against the plain Congressional meaning of 42 U.S.C. § 1988 that fee awards may be allowed in ordinary defense of state criminal prosecutions.

[29]/ Nor is 42 U.S.C. § 1988. Not a word therein "even winks at the possibility" of construing it to include defense of criminal cases thereunder.

We deem the foregoing analysis of C.C.P. § 1021.5 to apply equally to 42 U.S.C. § 1988. This statutory analysis,

Finally, petitioner points out that the same result--invalidation of [a Los Angeles City municipal code section]--could have been obtained in a civil action for an injunction or, more probably, for a declaratory judgment. [Citations.] In fact the petition filed below incorporates the complaint in one such action as an exhibit and asserts that 'the results achieved . . . in [petitioner's] criminal action . . . are not cognizably different in terms of public benefit [than those] which could or would have been achieved in an affirmative civil action . . . .' In addition petitioner points to several cases such as [2 federal Court of Appeals cases] in which arguably similar results were achieved under the federal Civil Rights Act and attorney's fees were awarded under the aegis of 42 U.S.C. section 1988.

The short answer to these arguments is that petitioner did not obtain[30]*/ an injunction. a*

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equally applicable to § 1988, is complete rebuttal to our instant state court of appeal opinion hereinbelow.

[30]/ Nor did our instant criminal defendants. All the artful word-twisting of our instant state Court of Appeal hereinbelow to give the appearance of civil litigation is to no avail. This was a simple criminal prosecution with typical writ review to state appellate courts (resulting in our earlier Lucero I) upon the constitutionality of Pringle and sufficiency of our criminal pleading. That the procedures in that review of criminal pleading required mandatory use of traditional "civil or common law prerogative writs" (e.g. the writ of mandate) is wholly irrelevant. The underlying litigation was criminal. Criminal defendants' pretrial "writ review" was the only method, short of trial and criminal appeal, by which criminal defendants could

declaratory judgment or relief under the Civil Rights Act. He successfully[31]/ defended a criminal prosecution at an alleged cost in attorney's fees of $35,000. The fact that petitioner might have reached the same result in some other type of action[32]/ tells us nothing about the legal costs that would have been incurred in such an action. We simply cannot apply a statute designed to compensate parties for attorney's fees in certain limited situations to cases not within the statute[33]/ on the theory of what might have been."

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have obtained review of this important question of law--a question ("preponderance" of porn movie exhibition) which our office ultimately won in Lucero I.

[31]/ We would say "unsuccessfully" defended the criminal case herein. The upshot of our instant (Lucero I) criminal demurrer litigation was the outright destruction of and explicit overruling of Pringle's erstwhile "preponderance" standard.

[32]/ As our reference to Bravo v. Cabell (1974) 11 Cal.3d 834, 839-840 [114 Cal.Rptr. 618, 523 P.2d 658] in our main text above makes clear, no matter what the "civil" manner of the writ review of our instant criminal pleadings, that writ review was CRIMINAL in nature, character, and origin.

Notice that Head's express approval of Fogelson decides our instant matter herein, which identical to Fogelson (and brought by identical attorneys hereinbelow) involved wholly and nothing but defense of a criminal prosecution.

[33]/ Our criminal prosecution, too, was "not within the statute" (42 U.S.C. § 1988), but it is for a federal, not a state court to construe § 1988 definitively. We seek that definitive construction of § 1988 herein, excluding all such fees incurred during defense of state criminal defendants.

Id., 120 Cal.App.3d at 859, 861-863 [175 Cal.Rptr. at 64, 65-67], emphasis added.[34]/

Fogelson, supra, is nearly identical[35]/ to our

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[34]/ Forgive our lengthy quotation of Fogelson, above, but that state case is squarely identical to our instant federal question now before This Court, was raised by our identical attorneys herein, and was decided correctly therein, unlike our instant Lucero II hereinbelow.

Fogelson was praised by our state supreme court in a different context in In re Head (1986) 42 Cal.3d 223 [228 Cal.Rptr. 184, 721 P.2d 65]:

> *"Justice Kaus [in Fogelson] was correct. Both the language of section 1021.5 and the history of the private attorney general doctrine which it codifies reflect a legislative purpose of encouraging the initiation of actions to vindicate statutory and constitutional rights, as well as important public policies, in circumstances in which the expense of litigation would otherwise deter private parties from doing so. The criminal defendant does not initiate the action, and his self interest provides incentive enough to assert available defenses. . . . A decision which has as its primary effect the vindication of the litigant's personal rights is not one which brings into play the attorney fees provision . . . ."*
>
> In re Head, supra, 42 Cal.3d at 228 [228 Cal.Rptr. at 186, 721 P.2d 65], emphasis added.

[35]/ That Fogelson involved the state version of 42 U.S.C. § 1988, rather than § 1988 itself, is no difference when one considers, cf. our Point II, infra, that any review of Congressional intent regarding § 1988 identically reveals "not even a wink" at any intent to apply that federal fee statute to state criminal defense counsel.

instant criminal municipal ordinance prosecution, and even involves the identical criminal defense attorneys herein as existed therein. And, exactly as was the criminal case in Fogelson, so, too, our instant criminal prosecution proceeded to higher state courts (Lucero I and Lucero II).[36]/ Unlike Fogelson, however, our instant criminal prosecution terminated in our state supreme court (Lucero I) with clear victory for our office, rather

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[36]/ Mr. Fogelson proceeded to higher state appellate courts via the "certification" route, Rule 63, Calif. Rules of Court. To be "certified" to the intermediate Court of Appeal the case must begin as an appeal to the Appellate Department of the Superior Court, after final judgment in municipal court. Because so few cases (criminal or civil) achieve "certification" from superior court (to the higher Court of Appeal) in their appellate status as appeals to superior court, the "preferred method" of handling important legal questions pretrial, hence avoiding final judgment, trial, and the appellate route altogether, is to "writ" (usually mandate or prohibition) the question immediately to the higher superior court, which allows discretionary treatment (rather than mandatory appellate treatment) of the issue.

Review of the superior court "writ" decision is no longer by (mandatory) appeal to the Court of Appeal, but by discretionary further "writ" review pursuant to California Code of Civil Proc. § 904.1(a)(4). Thereby are the thousands of municipal (inferior) court matters, civil and criminal, kept out of the higher appellate courts in California by allowing the latter summary discretionary, but not mandatory, review thereof.

than for criminal defendants, as in Fogelson.[37]/

Were criminal defendants' efforts by writ review[38]/

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[37]/ Ironic that Fogelson's admittedly victorious criminal defense attorneys were allowed no "public interest" attorney's fees, but instantly those same attorneys WERE allowed federal "public interest" (§ 1988) attorney's fees where they were NOT ultimately victorious in their state criminal defenses.

[38]/ This entire fee litigation ought to have been nipped in the bud at the initial state trial court (law and motion) level, where we raised the many aspects of "total chaos" which would result to our criminal justice system from granting attorney's fees hereinbelow

Incredibly, as recently as a month ago our instant state trial (law and motion) judge hereinbelow inquired as to the legal basis for our writ to This Court. Apparently the "total chaos" to California criminal justice mentioned in Fogelson, supra, isn't good enough for him; he needs a federal Fogelson to make it clear. We hope this writ petition will produce--even summarily--such a federal Fogelson.

The state statutory immunities in California protecting government employees and state prosecutors in particular are the Imbler-like "absolute immunity" of Government Code § 821.6:

> *"A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."* Emphasis added.

Also there is the more qualified Government Code § 820.2:

> *"If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been*

of our instant criminal pleadings in Long Beach Municipal Court hereinbelow "civil" actions upon which a 42 U.S.C. § 1988 attorney's fee might be awarded? No. Under California law it was plain that all such "writ review"[39]/ of our criminal complaints and their criminal demurrers remained "criminal" in nature however civil their method of review:

> *"We believe that in the context of the two cases at bench the proceedings for extraordinary writs should likewise be considered as a part of the criminal actions to which they refer. . . . We discern no significant difference between a review of a criminal proceeding by an appeal*[40]/

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liable had the enactment been constitutional, valid and applicable."

[39]/ That prerogative writs, such as mandate and/or prohibition, may have been considered "civil" for some reasons is wholly irrelevant to our instant criminal prosecution wherein the instant writs were employed.

Criminal defense counsel were required to use common law "civil writs" (here mandate) in order to be allowed immediate--pretrial--review of the central pleading issue, i.e. the sufficiency of our instant criminal complaints.

[40]/ We know of no counsel in any state foolish enough to seek 42 U.S.C. § 1988 attorney's fees for representing a criminal defendant throughout her criminal APPEAL. If allowed

from a judgment of conviction and a review of part of the same criminal proceeding by prerogative writ [41]*/to justify the conclusion that while the former process of review retains the criminal character of the proceeding below, the latter process is in some mysterious way substantially, if not entirely, metamorphosed.*

Indeed, a proceeding for a prerogative writ arising from a criminal action appears to us to have features inherently similar to an appeal from a judgment of conviction. Both methods of review are limited to issues involved in the criminal action, and they have a common objective of correcting or preventing error . . . on the part of the trial court in the underlying action.

. . . Such writ proceedings initiate no new controversy but relate only to the action below. They are made necessary by events in the criminal action and . . . are 'a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit.'

. . . We hold that where, as in the instant cases, a proceeding for an extraordinary writ is brought in the superior court which arises out of a criminal proceeding in the municipal court, such

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hereinbelow, this state court will have effectively allowed it by our state "writ review" which was fully tantamount to pretrial "appellate review" of this important criminal pleading issue. Cabell v. Bravo, supra, saw the plain similarities between "appeal" and pretrial "writ" review of legal issues. Cf. our text, p. 27, infra.

[41]/ Precisely as was our instant criminal defendants' pretrial "prerogative writ review" of the issue of Pringle-preponderance by prerogative writ of mandate hereinbelow.

> *writ proceeding, however denominated in nature as an entity in itself, must be regarded as a part of the underlying criminal action . . . .*"[42]/
>
> Bravo v. Cabell (1974) 11 Cal.3d 834, 839-840 [114 Cal.Rptr. 618, 523 P.2d 658], emphasis added.

Our instant criminal prosecutor's office, of course, paid no court filing fees at all[43]/ in the numerous appearances of Lucero I and Lucero II (three times before our state Supreme Court, four times before our state Court of Appeal, several times before our state Superior Court)[44]/ because of the criminal nature of this entire litigation.

Bravo, supra, marks precisely our instant writ review of a municipal court criminal prosecution--and it

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[42]/ Again, this "decides" our instant case. Congress never intended § 1988 to pay attorneys for defense of state criminal actions. "However denominated" Respondents' instant "writ" proceedings were CRIMINAL in nature and purpose.

[43]/ Nor did instant criminal defendants in all their numerous appearances in those same state appellate courts.

[44]/ From criminal prosecution which began, and remained all the while, in the Long Beach Municipal Court.

remains "criminal" throughout despite its otherwise civil aspects, and wholly irrespective of what it is called nor however it be "denominated." It could not be plainer, therefore, that our instant writ review of our criminal pleadings hereinbelow was "criminal" from beginning to end. As such it was reversible error for any court--state or federal--to grant attorney's fees pursuant to 42 U.S.C. § 1988 in this criminal prosecution.

II

CONGRESS NEVER INTENDED 42 U.S.C. § 1988 TO APPLY TO ATTORNEY FEES FOR RETAINED COUNSEL WHILE DEFENDING ORDINARY STATE CRIMINAL DEFENDANTS

There is not the slightest evidence of Congressional intent to apply § 1988 to attorneys defending ordinary state (or federal) criminal prosecutions. We look in vain throughout the intensive judicial scrutiny of legislative underpinnings of § 1988 for even a "wink" (paraphrasing Fogelson, supra) of

evidence allowing that legislation to apply to state criminal prosecutions. Even the majority in Maine v. Thiboutot (1980) 448 U.S. 1 [65 L.Ed.2d 555, 100 S.Ct. 2502], which refused to "repeat at length the scanty legislative history" adding the words "and laws" to § 1983, admitted that the legislative "ambit" was a "civil action authorized by that statute." 448 U.S. at 7 [65 L.Ed.2d at 561], emphasis added. The fees provision (§ 1988), therefore, was enacted to aid the initiation of "civil actions"--not defense against criminal prosecutions.

We need not delve into the "federal caseload" increased by civil § 1983 actions, see the dissent in Thiboutot, supra,[45]/ but can you imagine the tidal wave

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[45]/ The classic statement seems to be from Judge Kocoras:

> *"In a paroxysm of hyperbole, the plaintiff has described this as a case which 'shocks the conscience [and] is fundamentally offensive to civilized society.' . . . He is right in a very limited sense, but not at all in the way he thinks.*
>
> *It can be said with a substantial degree of certainty that*

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when Representative James Madison, who was later to become the fourth president of the United States and who has been called the "Father of the Constitution,' stood before the First Congress on June 8, 1789 and explained his proposed bill or rigths, neither he nor any of our nation's other forefathers had a situation like this in mind. Nor is it even remotely likely that anyone conceived of something like this in those dark days following the Civil War when Congress enacted section 1 of the Ku Klux Klan Act of 1871 (now 42 U.S.C. § 1983) to stem the tide of lynchings and other horrors perpetrated by the nightriders against the newly-freed slaves and their supporters. Only after 1976, when Congress passed a law that virtually guaranteed a plaintiff an award of attorney's fees if he managed to 'prevail' in a civil rights case, did lawsuits like this become not only thinkable but commonplace. With an assurance that their fees would be paid by the defendant if their client 'prevailed' in any way [i.e. § 1988], including settlement of a bogus suit for its nuisance value, and with no appreciable downside (losing plaintiffs almost never have to pay a victorious defendant's fees under the statute), lawyers flocked to the federal courts to file 'civil rights' cases./ Some good has come of this, of course, but many of these so-called civil rights actions have proven to have nothing whatever to do with civil rights as that term is normally understood. Instead, the Constitution, has been debauched as lawyers, 'not overly hindered by the courts,' have endeavored to transform even the most petty complaints against local governments into federal cases of constitutional dimension. Rather than vindicating fundamental rights, such lawsuits over the trivial annoyances of everyday life actually diminish public esteem for the Constitution. When every misstep of government, no matter how slight, is seized upon as creating a cause of action entitling its holder to a chance at receiving a cash jackpot from a federal jury,**/ plus an award of attorney's fees as an automatic bonus, important values are lost and the Constitution comes to be looked upon as a sort of lottery ticket. . . . ."*

Newman v. Village of Hinsdale (N.D.Ill.E.D, 1984) 592 F.Supp. 1307-1308, emphasis

of § 1988 writs which will work their way to This Court, if as hereinbelow § 1988 be interpreted to apply to defense of ordinary state criminal prosecutions?

In Perkins v Cross (8th Cir. 1984) 728 F.2d 1099, 1100, the court made it plain that attorneys would receive no § 1988 fees for work done in the underlying municipal court criminal action:[46]/

"On remand, the district court should determine

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added.

*/Instantly Respondents haven't needed even to file a federal action at all, but have recovered their (sham) "§ 1988 attorney's fees" in the original state criminal action itself.

**/Our instant Lucero II "short-circuit procedure" would allow state criminal defendants to bypass the "federal jury" altogether.

[46]/ Our instant Lucero II purports to follow Perkins, cf. Appendix # 2, p. 56, where it recites Perkins and Greer. In fact Lucero II "distinguishes out of existence " Perkins, infra, Borunda, infra, and the entire line of authority following the plain meaning of § 1988.

This latter "short-circuit" is part of the "total chaos" predicted by Fogelson, supra, if § 1988 attorney's fees were ever allowed to be gained, as hereinbelow, in the criminal action itself.

which items in the fee request relate to the prosecution of the successful civil rights claims, and which do not. In particular, we think no award should be made for time the lawyer spent in behalf of the four appellants whose civil rights claims were dismissed.[47]*/ These four appellants are clearly not 'prevailing parties*[48]*/ within the meaning of section 1988. Moreover, no fees should be awarded for any time the lawyer spent defending the appellants in the original municipal*

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[47]/ No such "civil rights action" was filed in our instant case, giving us the chance as "civil rights defendants" to have such an hypothetical action dismissed against us. In the multiple instances of civil litigation instituted by instant owner-defendants against the City of Long Beach over their Lakewood Theater's relationship to our instant porn-zoning ordinance, including those mentioned, infra, at our note # 6, it was plain that instant theater owners understood the difference between "initiating civil litigation" (possibly compensated by § 1988) and our instant "defense of criminal prosecution" (never compensated by § 1988). As Fogelson's example show us, instant criminal defense attorneys sought deliberately to confuse legally the disparate and contrary purposes of attorney compensation pursuant to § 1988. Unless This Court grants certiorari herein, their strategy of intentionally confusing § 1988 will succeed, to the abiding "confusion" of federal law hereafter.

It is hard to conceive how our instant criminal prosecution in Lucero I could possibly have violated these criminal defendants' "civil rights" when Lucero I decided the constitutional issue in OUR favor and against Respondents.

[48]/ As we note in our Point VII, infra, instant criminal defendants also were not "prevailing parties" in Lucero I hereinbelow. For this reason alone they were not entitled to fees, even if for some reason § 1988 were deemed to apply to our instant criminal defense situation.

court proceeding,[49]/ *except to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of the later civil rights claims*[50]/ *of those two appellants who received*

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[49]/ Instantly, our theater owners never got beyond the "original municipal court proceeding," as California law in Bravo, supra, makes clear.

This entire litigation has been nothing but defendants' elaborate charade to make it falsely appear that their instant use of a common law prerogative writ of mandamus (mandate) in pretrial judicial review of their criminal demurrers was separate, civil, and detached from our instant criminal prosecution. It wasn't separate, nor civil, nor apart from the latter criminal action.

[50]/ No such "later civil rights" claims were ever filed hereinbelow. Had such civil actions been filed hereinbelow, they would have been defended by the City's civil law department, i.e. the City Attorney, not our office, City Prosecutor, which deals exclusively with criminal, not civil, matters.

That our instant Court of Appeal in Lucero II was willing entirely to "confuse" Congressional intent in 42 U.S.C. § 1988 by wrongfully applying it to criminal defense of non-indigent defendants CONTRARY TO EVERY STATE'S appointment of counsel for indigent criminal defendants statutes, rather than solely in favor of prevailing plaintiffs "initiating otherwise deterred" civil rights lawsuits, must be rectified by This Court, lest federal § 1988 become the criminal tail which "wags the dog" in bankrupting every state's criminal justice system under false application of federal supremacy.

As repeated state and federal judicial opinion has declared, "criminal defendants are not 'deterred' from hiring counsel in defending themselves against criminal prosecutions." See our quotation of In re Head, infra, at our note # 34. Indeed Gideon v. Wainwright (1963) 372 U.S. 335

nominal damages, on which they prevailed, and which related to the various other claims on which they did not prevail. [Citation.] The court should also determine whether the appellants 'achieved a level of success[51]*/ that makes the hours reasonably expended a satisfactory basis for making a fee award."*

Emphasis added.[52]/

[9 L.Ed.2d 799, 83 S.Ct. 792]--for misdemeanors Argersinger v. Hamlin (1972) 407 U.S. 25 [32 L.Ed.2 530, 92 S.Ct. 2006]--gives the latter Sixth Amendment claim to such attorney's fees for indigent criminal defendants. Why destroy the latter attorney appointment scheme, present in all states and U.S. territories, by "confusing" it with § 1988 and "extending" it via § 1988 to NON-indigent criminal defendants at the instant rate of $350 per hour?

[51]/ We examine the "level of success" for instant criminal defendants in our Point VII, infra, to show no "success" at all, but great "loss" was "gained" by Respondents in our instant Lucero I criminal prosecution. Indeed, Respondents' "success" was so small as to preclude them "prevailing party" status in Lucero I. It was hardly "successful" for a theater owner to be told that BEFORE our instant Lucero I her theater was protected from our regulation a "preponderance" (182/365) of the daily calendar, but AFTER our Lucero I her theater is now protected only for a "single instance" (1/365) of the dialy calendar. Is that "success"? Not at all.

[52]/ Our own Ninth Circuit explicitly agrees with Perkins and implicitly against our instant state Lucero II in Borunda v. Richmond, 885 F.2d 1384, 1389 (9th Cir. 1988):

"Appellants cite two cases, Perkins [citation] and Greer [citation] for the proposition that attorneys' fees cannot be awarded for time spent in defending against prior criminal charges. . . . Both Perkins and Greer involved attorney fee awards pursuant to 42 U.S.C. § 1988.

Because Congress never intended 42 U.S.C. § 1988 attorney's fees to apply to our instant state criminal prosecution Lucero II's use of the latter federal statute hereinbelow must be vacated.[53]/

> *Both cases held that attorneys' fees incurred in defending against a prior criminal charge are not compensable within the meaning of § 1988. [Here follows the case footnote # 4 at this point:] The plain language of § 1988 supports these holdings. Section 1988 provides that in actions brought 'to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee.'*
>
> Emphasis the court's.

Borunda did allow the criminal attorney's fee costs to be recouped in a LATER civil § 1983 lawsuit as an element of damages, pleaded and proved, against police unlawful arrest, but Borunda was quick to eliminate such "damages" against a state prosecutor, who has "absolute immunity" in her absolute prosecutorial discretion to file criminal charges. See Borunda, supra, 885 F.2d at 1390 n.5. Instantly, of course, any such as yet unfiled "later civil action" would have been necessarily against our office, the Long Beach Prosecutor, which likewise enjoys "absolute immunity" against such lawsuits, even where attorney's fees might be proved as damages.

[53]/ Of course, Lucero II "short-circuits" the entire "later civil action" by improperly allowing the § 1988 fees to be gained, without pleading and without proof (and without any notice to the state prosecutor nor consideration of prosecutorial immunity) in the original criminal action itself! See our Point I, infra.

This is part of the "total chaos" (Fogelson, supra) to

III

THE IMMUNITY OF IMBLER V. PACHTMAN, WHICH AS A MATTER OF FEDERAL PUBLIC POLICY PROTECTS STATE PROSECUTORS FROM FISCAL INTIMIDATION BY CRIMINAL DEFENDANTS, LIKEWISE PROTECTS THOSE SAME STATE PROSECUTORS FROM FEDERAL FISCAL INTIMIDATION PURSUANT TO 42 U.S.C. § 1988 AS WELL

The very same well-established federal immunity[54]/ from fiscal intimidation accorded state

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California criminal justice which inures from Lucero II hereinbelow. The latter is California's--not This Court's--problem, but it's being perpetrated by use of a "federal § 1988" sham which This Court clearly may correct. Nor is the "federal § 1988" tactic limited to California. Once the tactic becomes known to the criminal defense bar, it will extend to every state and U.S. territory to bring "total chaos" to their criminal justice systems as well. See Judge Kocoras' diatribe against the excesses of § 1988 herein at our note # 45.

[54]/ However "thin" the prosecutor's immunity may become at the "edges" of the prosecutor's activities unrelated to prosecution and presentation of evidence, e.g. investigation of facts, advising police, etc., like Imbler we here involve solely the "core immunity" of a state prosecutor's decision to bring criminal charges and advocate those charges through higher reviewing courts:

> *"We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.*

prosecutors, that the latter may independently[55]/ serve

> *We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages*/ under § 1983."*
> Imbler v. Pachtman (1976) 424 U.S. 409, 431 [47 L.E.2d 128, 144, 96 S.Ct.984], emphasis added.
>
> */And for § 1988 attorney's fees of any kind, we would add.

[55]/ That is, freed from fiscal civil consequences of their "core" executive decisions to prosecute crime (to bring what kind of, and how many, allegations of crime, and against whom, to confiscate instrumentalities of crime, etc.), or not--"fiscal considerations" which must NOT form any part of the criminal justice system. The leading authority is This Court's Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96 S.Ct. 984] itself:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation*/ would cause a deflection of the prosecutor's energies from his public duties,**/ and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust . . . . One court expressed both considerations as follows:
>
> 'The office of the public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most

in their important executive function, applies equally against fiscal intimidation from 42 U.S.C. § 1988 as well.

> conscientious officials by those who would profit thereby. There would be involved in very case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the, prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The world of the prosecutor would thus be impeded and we would have move away from the desired objective of stricter and fairer law enforcement.' [Citation.]
>
> The common-law rule of immunity is thus well settled. We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983. We think they do."
>
> Id., 424 U.S. at 422-424 [47 L.Ed.2d at 139-140], emphasis added.

*/Including "litigation" over § 1988 attorney's fees, as herein.

**/As the instant state prosecutor admitted in the trial court below, he never would have instigated this--ultimately successful at great public benefit--criminal prosecution against Respondents if he had thought his office susceptible of budget-bursting liability in excess of $100,000 for this decision to prosecute.

The identical federal policy considerations which protect state prosecutors from fiscal intimidation[56]/ by lawsuits for money judgments likewise protects them from fiscal intimidation from money-judgment-like § 1988 attorney's fees. In each case the "fiscal intimidation"--and consequent failure of adversary criminal justice--is the same. In each case the federal immunity protects identical principles of prosecutorial independence essential for a system of criminal justice.

Because all state antagonist criminal justice

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[56]/ "Fiscal intimidation" is not merely a cute phrase, but conceptually cuts the heart out of our adversary system of justice. If 42 U.S.C. § 1988 attorney's fees be allowed herein, it marks the end of independence for criminal prosecutors. Before Lucero II fiscally immune prosecutors could assess prospective criminal charges with an eye single to justice, evidence, and proof. Since Lucero II prosecutors no longer look solely to the justice of their criminal cases, but must now look to "downside fiscal risk" to their operating budgets as well.

With at least one eye on their fiscal budgets, criminal prosecutors will no longer advocate "close" or "difficult" cases, to the eternal detriment of criminal justice. Factual truth will no longer be the goal, but rather protecting "downside risk" as in civil litigation. The resultant loss in adversariness to our criminal justice system will be worse than Fogelson's understated "total chaos."

systems[57]/ are properly adversary in nature for the maximum production of factual truth, we cannot allow that proper and fundamental adversariness to be structurally altered by disabling criminal prosecutors from the ardor and zeal necessary to discover that factual truth. We must ask this Court to strike down Lucero II with its implicit destruction of our California criminal justice system.[58]/

IV

EVEN IF THE COMMON LAW HAD NO IMMUNITY AGAINST INJUNCTION, A REMEDY WITHOUT "FISCAL INTIMIDATION" WHICH WAS NEVER ATTEMPTED HEREINBELOW, WE NEED NOT CONSTRUE 42 U.S.C. § 1988 AS GENERAL "STATUTORY BARRATRY" TO OVERRULE THE "AMERICAN RULE" OF ATTORNEY'S FEES

Respondents make much of the so-called

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[57]/ Except, perhaps, Louisiana, which retains the adversariness of the Napoleonic Code, but not the typical adversariness Anglo-American jurisprudence.

[58]/ This, again, is part of what Fogelson termed "total chaos" to California criminal justice if § 1988-like attorney's fees be granted retained criminal defense counsel.

"ordinary" rule of Newman v. Piggie Park Enterprises, Inc. (1968) 390 U.S. 400, 402 [19 L.Ed.2d 1263, 88 S.Ct. 964, 966] wherein a prevailing plaintiff[59]/

> *"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."*

The foregoing rule is met with three insurmountable obstacles to its application herein: (1) Respondents weren't "plaintiffs" at all, but remained criminal defendants[60]/ throughout the duration of our criminal prosecution hereinbelow; (2) Respondents did not "prevail" in Lucero I--see our Point VII, infra; (3) "total chaos" to our criminal justice system[61]/ is but one

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[59]/ The only "prevailing plaintiff" hereinbelow was our office, plaintiff in the underlying criminal prosecution, and ultimately victorious in overruling Pringle "preponderance" in our Lucero I.

[60]/ See our Point I, infra.

[61]/ Not to mention "absolute" federal public policy immunity for state criminal prosecutors, Imbler, supra, and the complete absence of Congressional intent to apply § 1988 to state criminal prosecutions.

"special circumstance"[62]/ to "render such an award unjust" herein.

It is plain that we cannot apply the "ordinary" § 1988 rule to a criminal prosecution which was never contemplated by § 1988 nor intended by Congress to apply herein. The "American rule," of course, is that each party bear her own expense of litigation, including her own attorney's fees.

Is there no common law immunity against injunction?[63]/ Perhaps. What does it matter? Injunction is NOT a remedy which is "personally intimidating"[64]/ but

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[62]/ Nor need we mention public policy, see our Point I, infra, Imbler immunity, see our Point III, infra, and destruction of all state appointment statutes of counsel for indigent defendants, see out Point VI, infra.

Each of the above-recited is a separate "*special circumstance . . . render[ing] such an award unjust.*"

[63]/ See Lucero II, Appendix # 2, pp. 50-52.

[64]/ Attorney's fees remain "personally intimidating" to a criminal prosecutor, even if entered against him in his/her official capacity, rather than personally, because they take an unforeseen "bite" (and sometimes a disastrously large "bite"--instantly some $100,000 or more) out of the fiscal budget.

is often helpful to criminal prosecutors; indeed, prosecutors often rely upon opposing counsel's injunction[65]/ to "test" that prosecutor's legal action,

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Unforeseen fiscal liabilities "intimidate" not only by unexpectedly limiting the amount of official monies thereafter available to the prosecutor, but also "intimidate" by creating the disgraceful stigma of the prosecutor's "having done something wrong" as well as the shameful impression that the (elected in this case) prosecutor is fiscally incompetent to manage his budget, nor to direct the litigation in his/her office so as to avoid such fiscal surprises. Even one such "fiscal surprise"--especially in the amount, as herein, exceeding $100,000--may doom victory for incumbent prosecutors at the polls. Next year, 1994, is an election year for Long Beach City Prosecutor.

[65]/ Exactly as we relied hereinbelow upon Respondents' writ of mandate to access pretrial review of the constitutional issue of our refusal to plead Pringle "preponderance" in our criminal complaints. The initial decision by our state Court of Appeal, ___ Cal.App.3d ___ [244 Cal.Rptr. 502], from which we took our second grant of review (ultimately Lucero I) before our state supreme court, correctly saw that our pleadings--alleging 12 counts of porn film exhibition against each of the three named criminal defendants (36 counts in all)--had nothing whatever to do with "single instance of use" of Lakewood Theater, but rather had to do with our failure to plead Pringle "preponderance" of porn film exhibition in the criminal complaints:

> *"A reading of the reporter's transcript of the hearing on the petition in the lower court indicates that the trial court granted the petition because the complaints failed to allege that the X-rated films exhibited met the preponderance standard established in Pringle [citation]*
>
> . . . .
>
> * * *

thereby testing and defining the law itself. Such

> *On September 4, 1987, . . . the People of the State of California petitioned this court for a writ of mandate to compel the Los Angeles Superior Court to vacate its August 5, 1987, Judgment for Issuance of Peremptory Writ of mandate which ordered the Long Beach Municipal Court to sustain, with 30 days leave to amend, the demurrers of real party in interest to the misdemeanor complaints.*
>
> *On September 9, 1987, this court denied the People's petition for writ of mandate.*
>
> *On November 18, 1987, this state's high court granted the People's petition for review, transferred the case back to us and directed us to issue an alternative writ. On December 3, 1987, we complied with the Supreme Court's order."*
>
> 244 Cal.Rptr. at 503-504, emphasis added.

For Lucero II to consider Respondents' instant writ of mandate--the identically standard pro forma procedural writ of mandate our office filed repeatedly in order to "raise" this pretrial criminal matter to the highest state court--to be "actually" a "prospective remedy" in the nature of an injunction or prohibitory relief is patently absurd.

The instant writ of mandate (ours as well as Respondents') hereinbelow was nothing more than pretrial testing (criminal demurrer) of our criminal complaints in order to see what form of evidence would be needed at trial. If a criminal demurrer be somehow construed to be a "prospective injunction," then, so also must any pretrial evidentiary motion, e.g. motion to suppress evidence, be so construed. The latter verges on the ridiculous. Are all things "prospective"--even after the official filing of criminal charges--simply because they haven't yet occurred?

As we state in our text above, Respondents' instant writ of mandate cannot be construed to be "prospective relief" in the nature of an "injunction" against a criminal prosecution which has already commenced.

"testing" and defining of the law is part of the criminal legal process; it has no intimidating nor adverse fiscal consequences to the criminal prosecutor. Not so "attorney's fees." Attorney's fees attack the existence of the prosecutor's office itself by attacking the prosecutor's fiscal base. That's intimidating to any prosecutor.

That our instant writs[66]/ of mandate may NOT be construed as "prospective injunctive relief"[67]/ is plain from (1) the criminal charges ALREADY FILED AND

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[66]/ Including our own writs of mandate--several of them--to higher state appellate courts in order to obtain judicial review of Respondents' writ of mandate sustaining their original criminal demurrers. Will OUR writ of mandate, raised identically in the same litigation and for the same purpose (pretrial review of criminal demurrers) ALSO be construed as "injunctive or prospective relief" against Respondents so that we might "stop" them from some action in futuro? Hardly. Their "actions" had been on-going for 6 years before our instant criminal complaints were charged in municipal court.

How can a common law writ of mandamus (mandate) be "prospective injunctive relief" in Respondents hands, but merely procedural pretrial judicial review in OUR hands in the same case at the same time?

[67]/ See Lucero II, Appendix # 2, part II, commencing at p. 50.

PENDING, which removes all possible "prospectivity"[68]/ from our instant litigation; (2) the California Civil Code precludes injunction against a pending action and against enforcement of a criminal statute; and (3) Respondents had no standing to seek "injunctive relief" against our criminal charges because Respondent theater owners already voluntarily and unilaterally had abandoned exhibition of any porn ("adult") movies at Lakewood Theater long before Respondents filed their instant Lucero II petition for attorney's fees,[69]/ on or

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[68]/ It is hardly "prospective" relief for defendants to seek surcease from criminal charges which have already been filed and for which court dates have already been set.

[69]/ We have in our files undisputed public evidence that Respondents leased Lakewood Theater on a long-term basis to a Mr. William Ward and Mr. Arthur Bowen in the weeks before July 22, 1988, for the purpose of exhibiting general release, non-porn films at both their interior screens. Non-porn film exhibition (100%) at both screens of Lakewood Theater did in fact commence on July 22, 1988. We expect this fact will be conceded by Respondents, and evidence thereof be located easily inside their business records of ownership--or ceased ownership--of Lakewood Theater.

We have not mentioned this fact hereinbefore because we never dreamed a state appellate court would construe a common law writ of mandate to be some esoteric form of

about December 18, 1989. A pertinent case is

Sullivan v. Little Hunting Park, 396 U.S. 229, 235 [24 L.Ed.2d 391, 396, 90 S.Ct. 400][70]/ which disallowed a

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"injunctive" or "prospective relief" entitling Respondents to an exemption from Fogelson public policy, to skirt Imbler immunity, and to allow attorney's fees against us under § 1988! Now that Lucero II has done so (as of its decision, May 7, 1993), we deem the foregoing undisputed facts to be relevant herein to the issue of Respondents' purported "injunctive relief" against our office.

[70]/ See Harlan, J., dissenting:

"Sullivan and Freeman sued under 42 USC §§ 1981, 1982 for injunctions and monetary damages. Since Freeman no longer resides in the area served by Little Hunting Park, Inc., his claim is limited solely to damages."

Also hereinbelow. Respondents cannot have sought purported "injunctive" nor "prospective" relief to exhibit porn films at Lakewood Theater in their fee petition, filed for the first time December 18, 1989, when Respondents had for some 2 years established their own policy of no porn-film exhibition at Lakewood Theater, and where for a year and a half Respondents had disabled themselves from all control of Lakewood Theater film exhibition by leasing that theater to third parties for the latter's full time exhibition of non-porn movies at both interior screens at Lakewood Theater.

Respondents simply had no standing to bring "injunctive" nor "prospective relief" to allow porn film exhibition at Lakewood Theater. Therefore, Respondents' only concern hereinbelow was for "damages." And the latter "damage" remedy, was, of course, precluded by Imbler immunity.

See also City of Los Angeles v. Lyons (1983) 461 U.S. 95 [75 L.Ed.2d 675, 103 S.Ct. 1660] failing to find injunctive relief appropriate where past illegality was not continuing, and unlikely to recur. It can't "recur" hereinbelow, now that

plaintiff standing to bring "injunction" where that plaintiff had disabled himself from such relief by moving out of the neighborhood serviced by the local community park. Here "non-plaintiff" Respondents did likewise by choosing a policy in 1987 of exhibiting wholly non-porn films at Lakewood Theater, then disabling themselves from all control in selection of Lakewood Theater movies by their "long term lease" of that theater to third party control in 1988. Any allegation of Respondents' "injunctive relief" or "prospective relief" in order to exhibit 100% porn movies upon any screen at Lakewood Theater in Lucero II is, therefore, not supported factually hereinbelow.

Nor was 42 U.S.C. § 1983 (nor its attorney's fees aspect § 1988) intended to become a "general barratry"

Lakewood Theater has been voluntarily torn down and replaced with office buildings. It is absurd, therefore, to construe Respondents' writ of mandate to be "injunctive" or "prospective" relief herein.

statute rewarding any plaintiff with attorney's fees anytime s/he sued someone, thereby overruling the "American rule" of attorney's fees wherein each party bears its own costs of litigation, including its own attorney's fees. "Barratry" was defined at common law as, *"the offense*[71]*/ of frequently exciting and stirring up quarrels and suits, either at law or otherwise."*[72]/ 42 U.S.C. § 1988 does tend to "subsidize" litigation,[73]/ but was never intended by Congress to be a "general barratry statute" awarding attorney's fees to any plaintiff anytime. By its own wording § 1988 is LIMITED to an "*action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title*, and not for attorney's fees anytime to any plaintiff.

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[71]/ Barratry was illegal at common law.

[72]/ Black's Law Dictionary (West, centennial, 6th, ed., 1990), p. 150.

[73]/ See Judge Kocoras' castigation of that statue herein at our note # 45.

Because our instant Lucero II attorney's fees were wrongfully awarded to a non-plaintiff in a state criminal prosecution, it was without statutory basis.

V

IT VIOLATED THE STATE PROSECUTOR'S FEDERAL "DUE PROCESS/FAIRNESS/NOTICE" TO LEARN FOR THE FIRST TIME AT THE CONCLUSION OF LENGTHY STATE CRIMINAL LITIGATION OVER THE SUFFICIENCY OF THE STATE CRIMINAL ACCUSATORY PLEADING, BEGINNING IN THE INFERIOR MUNICIPAL COURT WHERE THE PROSECUTOR WAS THE CLEAR CRIMINAL "PLAINTIFF" REPRESENTING THE STATE OF CALIFORNIA AND THE NAMED CRIMINAL DEFENDANTS THE "DEFENDANTS" IN THAT CRIMINAL MATTER, AND ENDING FINALLY IN THE STATE SUPREME COURT WHERE THE PROSECUTOR "PLAINTIFF" WON CLEAR VICTORY OVER THESE NAMED CRIMINAL "DEFENDANTS," TO LEARN TO THE PROSECUTOR "PLAINTIFF'S" GREAT SURPRISE THAT THE PROSECUTOR WASN'T A "PLAINTIFF" AT ALL IN THIS LITIGATION, BUT WAS IN FACT A FEDERAL CIVIL "DEFENDANT" IN AN UNPLEADED AND UNPROVED 42 U.S.C. § 1983 ACTION, WITH THE CRIMINAL DEFENDANTS BEING SOMEHOW CIVIL "PLAINTIFFS" PURSUANT TO THAT FEDERAL STATUE SO AS TO ALLOW THEM ATTORNEYS FEES UNDER 42 U.S.C. § 1988

Fundamental fairness and basic due process

require advance notice to a defendant that she/he/it is being sued. The latter never happened hereinbelow. Neither the "People of the State of California" nor the City of Long Beach were named as "defendants" in any action commenced by our Respondents as "plaintiffs" therein. To be sure, Respondents did "respond" to our criminal prosecution by "demurring" to our criminal pleading. They thereafter pursued[74]/ that overruled criminal demurrer into higher state courts for appropriate pretrial review by writ of mandate. But as our Point I, infra, conclusively demonstrates, such action by Respondents was purely part of the criminal prosecution

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[74]/ And so did we. It was in the public interest that we or Respondents, or both, pursue the constitutional issue of Pringle "preponderance" into higher appellate courts for definitive ruling, one way or the other.

It was not in the public interest--the sole interest governing public prosecution by our prosecutor's office--that we seek "dismissal" of such a potentially constitutionalizing definition, which our office welcomed and sought to clarify.

Our civil counsel, the City Attorney's Office--whose sole loyalty, unlike our own, is to the City of Long Beach--might have "sought dismissal" had our prosecutor's office truly been sued by Respondents in a civil § 1983 action.

which OUR OFFICE commenced,[75]/ not any independent "civil action" authorized by 42 U.S.C. § 1988. Had our office thought it was truly being sued in a civil capacity in any form, we would instantly have turned "defense" of such "civil litigation" over to the legal department of the City of Long Beach, i.e. their City Attorney.

Nor was the City of Long Beach itself ever named hereinbelow, as it had been named by Respondents in some of the numerous civil actions over Lakewood Theater mentioned herein at our note # 5, infra. What Respondents were UNABLE to accomplish by way of attorney's fees in the aforementioned truly civil litigation against properly named municipal or other civil defendants (and correctly "defended" by the civil Long Beach City Attorney, NOT our office, the Long Beach

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[75]/ And which was protected in its instant "core activity" of filing criminal charges by Imbler "absolute immunity" for such criminal prosecution hereinbelow.

Prosecutor) they were IRONICALLY able to accomplish in defending our instant criminal prosecution hereinbelow.[76]/ It violated our "due process"

---

[76]/ Lucero II rather cavalierly states that neither our nor the City's "due process/notice" was violated hereinbelow:

> *"Thus, in Brando v. Holt the Court held the city was responsible for paying the attorney fees awarded to the prevailing plaintiffs in a section 1983 action against the city's director of police sued in his official capacity. (Id. at p. 471, 105 S.Ct. at p. 877.)*
>
> *In Hutto v. Finney,*/ supra, 437 U.S. 678, 98 S.Ct. 2565, the Court rejected the state attorney general's argument the state could not be responsible for attorney fees under section 1988 based on an action for injunctive relief where prison officials were the named defendants . . . ."*
>
> Emphasis added.
>
> */Any reference to Hutto v. Finney (1978) 437 U.S. 678 [57 L.Ed.2d 522, 98 S.Ct. 2565] in our instant context is ludicrous; Hutto allowed express "financial penalty" (437 U.S. at 691) by way of "attorney's fees for bad faith" (id.) against "recalcitrant" Arkansas prison officials' disobedience to federal court orders. Our trial court below expressly found "good faith" in our instant criminal prosecutions hereinbelow.

The short answer to the above is that our office was protected "absolutely" by Imbler immunity in its decision to institute the instant criminal prosecution against Respondents. We, therefore, took no notice of nor considered at all Respondents' threatened "civil intimidation" by 42 U.S.C. §§ 1983, 1988 nor any other federal (nor state) statute. The whole purpose of our "absolute immunity," of course, exists that we may safely ignore such "intimidation" in our decision to

commence criminal prosecution. Our office's "absolute immunity," therefore, HARDLY represented the City of Long Beach, which might have raised separate and additional civil defenses, as it successfully did in all the civil litigation mentioned herein at our note # 6, infra.

We underscored the important phrases "director of police" and "prison officials" in Lucero II quoted above because of the latter's blatant failure to notice the "absolute immunity" accorded state prosecutors, BUT only "qualified immunity" accorded police officers and/or prison officials. See Butz v Economou (1978) 438 U.S. 478 [57 L.Ed.2d 895, 98 S.Ct. 2894]:

> *"The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested [citation] controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. [Citation.] Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.*
>
> *. . . We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or deportation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and that sanctions should be sought."*
>
> 438 U.S. at 512, 515 [57 L.Ed.2d at 919, 921], emphasis added.

Our instant Lucero II was apparently oblivious to the entire concept of prosecutorial "absolute immunity"

hereinbelow to find out belatedly that we ought not to have ignored, but OUGHT TO HAVE BEEN INTIMIDATED[77]/ by Respondents' slightest allegation of § 1988 fiscal vengeance. It violated the City's "due process" by disallowing the City its proper attorney--an attorney which might have done other than simply ignore and refuse intimidation by Respondents' fiscal claims herein.

VI

IF, AS HEREIN, ORDINARY RETAINED CRIMINAL DEFENSE COUNSEL (PRESUMABLY ALREADY PAID A RETAINER FEE UP-FRONT BY THEIR NON-INDIGENT CRIMINAL CLIENTS) MAY OBTAIN NEW AND DUPLICATE ATTORNEY'S FEES--THIS TIME AT STATE PUBLIC EXPENSE PURSUANT TO 42 U.S.C. § 1988 WHERE, AS HEREIN, IT IS EXPRESSLY CONTRARY TO STATE PUBLIC POLICY TO ALLOW IT UNDER STATE LAW--THAT ERRONEOUSLY EXALTS 42 U.S.C. § 1988 INTO A DE FACTO "FEDERAL REPEAL" OF EVERY STATE, FEDERAL, AND TERRITORIAL "COURT

---

hereinbelow. That was surprising.

[77]/ Contrary to the plain meaning of Imbler, supra, and state public policy (Fogelson, supra).

APPOINTMENT" STATUTE WHICH LIMITS PAYMENT OF PUBLIC FEES SOLELY TO THOSE CRIMINAL DEFENSE ATTORNEYS APPOINTED BY THE COURT, AUTHORIZED BY STATE STATUTE, AND DISBURSED ACCORDING TO STATE PROCEDURES

U.S. states and territories bear great expense to enact, administer, and pay attorneys to represent indigent criminal defendants in their respective criminal justice systems.[78]/ Lucero II brings "total chaos"[79]/ to those state/territorial administered attorney fee statutes. Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792] mandates court-appointed attorneys for INDIGENT criminal defendants. Lucero II improperly applies 42 U.S.C. § 1988 for payment of non-court appointed attorney's fees to NON-INDIGENT criminal defendants as well, and despite the state-

---

[78]/ In California the attorney appointment statutes are found at Penal Code §§ 987.2 et seq. Every state and U.S. territory has such statutes. We need not articulate them all in this Petition, but will be happy to do so upon further briefing, if necessary.

[79]/ Fogelson, supra. See our Point 1, infra.

regulated court-appointment statutes in each state's criminal justice system. No longer will state/territorial court-appointed counsel statues be necessary where, as herein, judges have Lucero II "federal" supremacy to grant attorney's fees to wealthy[80]/ criminal defendants, who have presumably already paid those same attorneys their retainer fees. For this reason alone Lucero II must be vacated herein.

VII

CRIMINAL DEFENDANTS MAY NOT BE DEEMED "PREVAILING PARTIES" UNDER 42 U.S.C. § 1988 WHERE THEY NEVER PLEADED NOR PROVED A VIOLATION OF § 1983 AND WHERE AT BEST THEY ACCOMPLISHED HIGHER REVIEW IN STATE APPELLATE COURTS MERELY TO SUSTAIN THEIR DEMURRERS IN THE CRIMINAL PROSECUTION, BUT WHERE THE STATE PROSECUTOR SIMULTANEOUSLY OBTAINED REVIEW IN THE HIGHEST STATE COURT OVERRULING ALL STATE PRECEDENTIAL AUTHORITY WRONGFULLY INTERPRETING THIS COURT'S DECISION IN YOUNG V. AMERICAN MINI THEATRES, INC. TO CREATE AN ERSTWHILE

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[80]/ Indeed, as herein, international corporate clients--Walnut Properties, Inc., a California corporation.

STATE "PREPONDERANCE" STANDARD (50+% PORN FILM EXHIBITION)--A CONSTITUTIONAL STANDARD NOW ABOLISHED BY VIRTUE OF OUR INSTANT STATE COURT LITIGATION--WHERE THE STATE PROSECUTOR SUBSTANTIALLY ALTERED THE LEGAL RELATIONSHIP OF THE INSTANT PARTIES SO AS TO RENDER STATE PROSECUTION OF ADULT ENTERTAINMENT THEATERS EASIER HEREINAFTER

Space prevents full discussion herein. Respondents may not be considered "prevailing parties" under § 1988, even if the latter might somehow apply to our instant criminal prosecution, for the simple reason that the only "changed legal relationship of the parties" which occurred in our Lucero I was final abolition of the Pringle "preponderance" standard for defining "use" of an (adult) "theater" in our instant Young-type (Detroit-type non-cluster) porn-zoning ordinance. The leading case is Texas State Teachers Assn. v. Garland Independent School Dist. (1989) 489 U.S. 782 [103

L.Ed.2d 866, 109 S.Ct. 1486].[81]/ Because

---

[81]/ *"We must decide today the proper standard for determining whether a party has 'prevailed' in an action brought under certain civil rights statutes such that the party is eligible for an award of attorney's fees under . . . § 1988."*

489 U.S. at 784 [103 L.Ed. at 872, emphasis added.

In "deciding" the correct § 1988 standard for "prevailing party" status Texas State Teachers Assn. adopted a two-fold test, i.e. (1) an "absolute" test, and (2) a "changed legal relationship" test for those parties meeting the absolute test. The first (1) absolute test that a party must meet in order to warrant "prevailing party" status for § 1988 is "some relief on the merits." Relief (no matter how much) on pleadings or other legal posturings short of relief on the merits cannot suffice for § 1988 "prevailing party" status.

"Respect for ordinary language requires that a plaintiff receive some relief on the merits of his claim before he can be said to prevail."

489 U.S. at 792 [103 L.Ed.2d at 877, emphasis added.

Petitioners achieved no "relief on the merits" instantly. They received at best purely technical relief on the pleadings: "The People . . . are not entitled to proceed with the action as pleaded." Lucero I, supra, Appendix # 1, p. 23, emphasis added. All our office needed to do was to amend our criminal pleadings to reflect the new Lucero I "regular and substantial course of conduct" standard (id., n. 11), and we could easily have proceeded with our instant criminal action below. And the only reason we did not do so was by then Petitioners had given up the fight (on the merits, by the way), elected to exhibit purely non-porn movies at Lakewood Theater, and eventually leased the theater to third parties for exhibition of non-porn

movies. Petitioners took nothing by way of "merits" from this litigation.

> *"Where the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."*
>
> Id., emphasis added.

Because Petitioners never passed the "absolute" test of "relief on the merits," we need not discuss the auxiliary additional test necessary for "prevailing party" status, i.e. that the litigation have wrought a "change in the law" in favor of the prevailing party.

> *"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non."*
>
> 489 U.S. at 792-793 [103 L.Ed.2d at 878], emphasis added.

For "prevailing party" status to be accorded a litigant the latter must have not only accomplished something on the merits (the "absolute" test mentioned earlier) it must also have wrought a "material alteration of the legal relationship of the parties," that is, a substantive "change" in the illegal practices or policies of the losing litigant. The latter Petitioners never accomplished hereinbelow. Petitioners never won anything at all which would preclude our office from prosecuting them, other than we would have to do it on an amended complaint. "Single instance of use," the only asserted victory for Petitioners, was NOT any "change" in the law at all, let alone a change in their favor, nor did Petitioners accomplish any

Petitioners succeeded in meeting neither the federal (1) "absolute" test of victory on the merits, nor did it meet the federal requirement of (2) "material alteration of the legal relationship of the parties," therefore, Petitioners cannot be accorded "prevailing party" status herein. They, therefore, cannot be awarded attorney's fees under § 1988.

VIII

IT WAS EXPRESS "ABUSE OF 42 U.S.C. § 1988" TO ALLOW FEES INSTANTLY ON THE BASIS OF CRIMINAL DEFENDANTS' HYPOTHETICAL "VICTORY" ON THE ISSUE OF "SINGLE INSTANCE" OF PORN FILM EXHIBITION, WHERE STATE LAW PRIOR TO OUR INSTANT LUCERO I STATE SUPREME COURT DECISIONS WAS THAT A "PREPONDERANCE" (NOT MERELY A "SINGLE INSTANCE") OF PORN EXHIBITION WAS EXEMPTED FROM OUR PORN-ZONING ORDINANCE, THAT IS, CRIMINAL DEFENSE COUNSEL IMPROPERLY "ABANDONED HIS CLIENT" BY ARGUING IN FAVOR OF "SINGLE INSTANCE" IN HOPES OF HAVING "ANY VICTORY AT ALL" WHICH MIGHT QUALIFY AS POSSIBLY PREVAILING ON THAT ISSUE SO AS TO SEEK A

---

alteration in the "practices or policies" of our office so as to render them more immune from criminal prosecution.

PUBLIC ATTORNEY FEE UNDER § 1988 WHEN COUNSEL OUGHT TO HAVE ARGUED FOR THE GREATEST PROTECTION OF HIS CLIENTS (PREPONDERANCE OR MORE) RATHER THAN THE SLIGHTEST POSSIBLE ("SINGLE INSTANCE") PROTECTION OF MOVIE OWNERS/EXHIBITORS

Federal courts have begun to see express "abuse" (as they call it) of 42 U.S.C. § 1988 where a plaintiff's counsel "abandons" the client's extreme claims on the merits in order to obtain more modest relief, sometimes abandoning all claim to damages other than "nominal damages," purely to insure counsel's OWN fees pursuant to § 1988, irrespective of the "bust" (even counsel-inculcated "bust") achieved on the merits of the litigation. Such a case was Romberg v. NIchols (9th Cir. 1992) 970 F.2d 512, 521, wherein plaintiff's counsel argued to the jury that not the original prayer for $2,000,000 was necessary to do justice, but rather even a verdict of "$1 nominal damages" would suffice--whereupon that jury promptly returned a verdict of "$1

nominal damages."[82]/ Having "prevailed" on the merits, however, plaintiff's counsel was entitled to § 1988 attorney's fees, which counsel promptly collected to the utter chagrin of his client's "$1.00."[83]/

---

[82]/ We think counsel did the same here in arguing a movie theater's "single instance" of porn exhibition must be immune from prosecution. State law (Pringle) before our instant Lucero I was that "182 instances" of porn film exhibition at a movie theater was "immune" from our instant porn-zoning ordinance. By defense counsel's arguing for "single-instance" (a single exhibition? a single day's repeated exhibitions?), rather than Pringle "preponderance," defense counsel implicitly conceded Pringle "preponderance" to be incorrect and in need of vast reduction. This may have helped our efforts to overrule Pringle and injured Respondents' interests in maintaining Pringle "preponderance." We think counsel "abandoned" his clients in so doing thus precluding recovery of § 1988 attorney's fees.

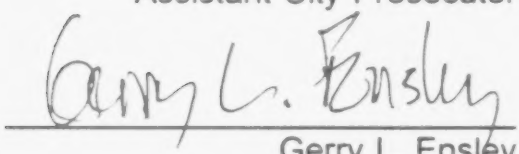
[83]/ This, stated the majority in Romberg, was "abuse" of § 1988 and abandonment of the client by the attorney solely to line the attorney's own pockets despite his having voluntarily torpedoed his own client's damages claim.

CONCLUSION

For the foregoing reasons the judgment for attorney's fees pursuant to 42 U.S.C. § 1988 must be reversed.

LONG BEACH CITY PROSECUTOR
John A. Vander Lans
City Prosecutor

Robert R. Recknagel
Assistant City Prosecutor

By 

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(2)

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

No. 93-727

In The

Supreme Court of the United States

October Term, 1993

STATE OF CALIFORNIA,

Petitioner,

vs.

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON, WALNUT PROPERTIES, INC., a California corporation,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Seven

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT 1

ARGUMENT 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Farrar v. Hobby, 113 S. Ct. 566 (1992) 4

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4

Hutto v. Finney, 437 U.S. 678 (1978) 3, 5

Owen v. City of Independence, 445 U.S. 622 (1980) 5

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 4

STATUTES

42 U.S.C. § 1983 ..... 1, 2, 3

42 U.S.C. § 1988 ..... 1, 2, 6

OTHER

Long Beach, Cal., Mun. Code § 21.51.030 1

Sup. Ct. R. 14.1(k)(ii) 1

Respondents oppose the petition for a writ of certiorari to the California Court of Appeal, Second Appellate District, Division Seven, in this case.

OPINIONS BELOW

Petitioner, in violation of Rule 14.1(k)(ii) of this Court, failed to append the order of the Superior Court, Los Angeles County, awarding respondents attorneys' fees and costs pursuant to 42 U.S.C. § 1988, as prevailing parties. A copy of said order is appended as respondents' appendix (Resp. App.).

STATEMENT

A. In September 1987, the Long Beach City Prosecutor filed a criminal complaint in the Municipal Court of the Long Beach Judicial District, County of Los Angeles, alleging a violation of section 21.51.030 of the Long Beach Municipal Code, which prohibited an "adult" movie theater from operating in certain areas of the city. The complaint alleged that a single exhibition of an adult film in respondents' theater converted it into an adult theater.

Respondents filed a petition in the Superior Court of the State of California for the County of Los Angeles to restrain the criminal prosecution, alleging that the City's ordinance, on its face and as construed, violated the First and Fourteenth Amendments. The action was brought pursuant to 42 U.S.C. § 1983, and alleged that "[b]y the underlying criminal proceedings, [respondents] are being

subjected to the deprivation, under color of state law, of rights, privileges and immunities secured by the constitution of the United States, and particularly of the First and Fourteenth Amendments." App. 67.[1]

Respondents alleged that their activities "are protected by the First Amendment," and that on its face and as applied "the Long Beach ordinance violates the right[s] guaranteed by those provisions." App. 75. Finally, respondents alleged that unless further proceedings were restrained they "will be irreparably injured in that the exercise of their right or freedom of speech will be chilled and denied." App. 76. Accordingly, they sought an order restraining further criminal proceedings. App. 77.

On August 5, 1987, the Superior Court issued its judgment, App. 80-83, finding that the criminal proceedings subjected respondents "to a deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution" and issued its writ. App. 81-82. The California Supreme Court affirmed, stating that each count of the complaint was "based on the unconstitutional 'single use' standard and that the City Prosecutor could not proceed with the action as pleaded." App. 20.

B. On November 21, 1988, respondents moved in the superior court for a fee award against the City of Long Beach pursuant to 42 U.S.C. § 1988, alleging that they are the prevailing party in the proceeding brought pursuant to 42 U.S.C. § 1983, and that no special circumstances existed that would render an award of fees

---

[1] App. refers to the Appendix to Petition.

unjust. App. 86. The motion was heard on February 13, 1990.

On March 9, 1990, the Honorable Jack Newman, Judge of the Superior Court, filed an order, awarding fees. The court found that the action to restrain the Long Beach City Prosecutor from pursing the criminal prosecution was filed pursuant to 42 U.S.C. § 1983; that the petition was brought pursuant to the City Prosecutor's unconstitutional "single showing" standard; that respondents were being subjected to the deprivation, under the color of state law, of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution; that the activities on which the criminal cases were based were protected by the First Amendment; that the City's ordinance, as interpreted and applied by the City Prosecutor, violated the federal constitution; and that unless the criminal proceeding was restrained, respondents' First Amendment rights would be chilled and denied. Resp. App. 1-4.

The court found that respondents are the prevailing parties, Resp. App. 3-4; that *Hutto v. Finney*, 437 U.S. 678 (1978), rejected the suggestion that government entities or their employees are immune from fees, Resp. App. 4; that the City of Long Beach was the real party in interest, Resp. App. 4; that there were no "special circumstances" that would render a fee award unjust, Resp. App. 4; and that the "invocation of prosecutorial immunity is without merit," Resp. App. 4.

On May 7, 1993, the California Court of Appeal filed its opinion affirming the award of attorneys' fees. App.

41-61. On August 12, 1993 the California Supreme Court denied the Long Beach City's petition for review. App. 63.

ARGUMENT

Although it is difficult to decipher the petition because, *inter alia*, it contains 83 footnotes, many of which are long and rambling, it is clear that the petition does not raise any federal question worthy of review. The decision of the court below does not conflict with any decision of this Court; indeed it is in total harmony with the decisions of the Court.

1. The court of appeal held that respondents were the prevailing party because they filed their action to prevent any prosecution based on the unconstitutional charges and, at the termination of the case the California Supreme Court restrained the criminal prosecution. Thus, the action changed the legal relationship between the parties: "Where once respondents were defendants threatened with a prosecution for alleged violation of a Long Beach municipal ordinance, at the end they were freed from having to defend against the unconstitutional charges." App. 48-49. In reaching this result, the court of appeal correctly relied on *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See also Farrar v. Hobby*, 113 S. Ct. 566 (1992), decided after the court of appeal rendered its opinion.

2. The court of appeal held that no immunity shields the City from paying a fee award under section 1988 because neither municipalities or their employees

are immune from fees. App. 50-52. In reaching this result the court properly relied on *Hutto v. Finney*, 437 U.S. 678 (1978), and *Owen v. City of Independence*, 445 U.S. 622 (1980).

3. Ruling that the superior court properly found the City of Long Beach to be the real party in interest and liable for fees, the court of appeal stated:

> All the criteria for imposing the fee award against the City of Long Beach are met in this case. The entire controversy concerned the enforcement of Long Beach's zoning ordinance. The "single use" standard was the City Prosecutor's interpretation of the city ordinances. The City Prosecutor's office has defended the ordinance and represented the City's interests in all proceedings at every level. . . . The trial court found, and we agree, the City of Long Beach was the real party in interest in these proceedings to defend the ordinance.

App. 55.

In reaching this conclusion, the court of appeal, quoting *Hutto v. Finney* stated:

> The legislative history makes it clear that in such suits attorneys' fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control or from the state or local government (*whether or not the agency or government is a named party*)."

App. 55 (emphasis added by the court of appeal).

4. In ruling that section 1988 attorneys' fee awards may be properly awarded in actions to restrain unconstitutional criminal proceedings, the court below stated that the fees in this case were neither incurred nor awarded for the purpose of defending a criminal prosecution. App. 57. Rather, the court explained, respondents simply sought to enforce their right not to have to defend against unconstitutional charges. App. 57. Accordingly:

> It would appear the broad language of section 1988 should encompass proceedings prompted by an impending criminal prosecution as well as actions for declaratory or injunctive relief brought for the same purpose. (Compare *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) [arrestee properly awarded attorneys' fees against district attorney and attorney general in action for declaratory and injunctive relief to restrain threatened criminal prosecution].)

App. 58.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: November 23, 1993

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON, WALNUT PROPERTIES, INC., a California corporation, Petitioners, vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	Case No. C 715969 AMENDED PROPOSED ORDER FOR ATTORNEY'S FEES (Filed Mar. 9, 1990)

Petitioners' motion for attorney's fees, made pursuant to 42 U.S.C. § 1988, was duly heard on February 13, 1990. For the foregoing reasons the motion is granted.

A. On January 20, 1989, petitioners filed, pursuant to 42 U.S.C. § 1983, a petition for writ of mandate to restrain criminal proceedings brought against them by the Long Beach City Prosecutor under § 21.51.030 of the Long Beach Municipal Code. The petition alleged that the prosecution was brought pursuant to the city prosecutor's unconstitutional "single-showing" standard (¶ 1,2); that petitioners were being subjected to the deprivation, under the color of state law, of rights, privileges and

immunities secured by the First and Fourteenth Amendments to the United States Constitution and sought relief pursuant to 42 U.S.C. § 1983 (¶ 3); that the Long Beach City Prosecutor initiated and was pursuing the prosecutions against petitioners, asserting that "a single-showing of an 'x-rated' movie in a particular location violated the Long Beach ordinance" (¶ 16); that petitioners' activities on which the criminal cases were based or protected by the First Amendment, and that the Long Beach ordinance as interpreted and applied by the City Prosecutor violates the Federal Constitution (¶ 20); that petitioners had no plain speedy or adequate remedy other than the relief sought in the petition (¶ 21); and that unless the proceeding initiated and pursued by the City Prosecutor is restrained "petitioners will be irreparably injured in that the exercise of their First Amendment rights will be chilled and denied (¶ 22).

Petitioners prayed for a writ directing the City Prosecutor to show cause why a peremptory writ should not issue restraining further proceedings under the criminal complaints initiated and pursued under the unconstitutional single-showing theory. Petitioners also sought attorney's fees.

> This court granted the writ. It determined that, pursuant to controlling authority, the proceedings against petitioner under the allegations of the complaint filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States Constitution and article I, section 2 of the California Constitution.

Judgment for Issuance of Peremptory Writ of Mandate at 2 (Aug. 5, 1987).

The court of appeal affirmed the judgment of this court, *People v. Superior Court (Lucero)*, 198 Cal. App. 3d 1038, 244 Cal. Rptr. 502 (1988), and the Supreme Court affirmed the judgment of the court of appeal. *People v. Superior Court (Lucero)*, 49 Cal. 3d 14, 259 Cal. Rptr. 740 (1989).

B. The Civil Rights Attorney's Fees Awards Act of 1976 provides in pertinent part that "[i]n any action or proceeding to enforce . . . section[] . . . 1983 . . . of the title . . . , the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the cost." 42 U.S.C. § 1988 (1982). The statute applies in state courts equally as in federal courts. *E.g., Filipino Accountants' Ass'n v. State Bd. of Accountancy*, 155 Cal. App. 3d 1023, 1031, 204 Cal. Rptr. 913, 917 (1984).

This is a proper case for a fee award under § 1988 because this proceeding was brought to enforce 42 U.S.C. § 1983. Petitioners are entitled to fees since they are clearly the prevailing parties. They initiated the proceeding to restrain the criminal proceedings under the City Prosecutor's "single-use" theory, and the Supreme Court held that each count of the criminal complaint was "based on the unconstitutional 'single-use' standard," and that the city was "not entitled to proceed with the action as pleaded." *People v. Superior Court (Lucero)*, 29 Cal. 3d at 28, 774 P.2d at 777, 259 Cal. Rptr. at 748.

C. In enacting § 1988, "Congress considered and firmly rejected the suggestion that States should be immune from fee awards." *Hutto v. Finney*, 437 U.S. 678,

693 n.31, 98 S. Ct. 2565, 2577, n.31 (1978). Congress "intended that the attorneys fees, . . . will be collected either directly from the official in his official capacity, . . . or from the . . . local government (whether or not the . . . government is a named party)" *id.* at 694, 98 S. Ct. at 2575.

The City of Long Beach is the real party in interest in this case and is liable for fees. There are no "special circumstances" here that would render a fee award unjust, and the "invocation of prosecutorial immunity is without merit and may be disposed of summarily." *Wilson v. Stocker*, 819 F.2d 943, 950 (10th Cir. 1987).

D. Petitioners' counsel, Stanley Fleishman, reasonably expended 88.42 hours in connection with this matter. A reasonable rate for his services is $350 per hour. Accordingly a reasonable attorney's fee award in this action for his services would be $30,947.00.

Petitioners' counsel, David Grosz, reasonably expended 89 hours in connection with this matter. A reasonable rate for his services is $200 per hour. Accordingly, a reasonable attorney's award in this action for his services would be $17,800.00

The lodestar amount comes to $48,747 (Fleishman, $30,947.00; Grosz $17,800.00). The sum of $13,747.00 should be deducted from this amount to reflect the fact that petitioners were not entirely successful in this proceeding. Accordingly, petitioners are entitled to attorney's fees in the sum of $35,000. Additionally, they are entitled to costs in the sum of $1,773.85.

E. These conclusions are reached in the exercise of this court's discretion, and after consideration of all the factors enumerated in *Serrano v. Unruh (Serrano III)*, 20 Cal. 3d 25, 49, 569 P.2d 1303, 1316, 141 Cal. Rptr. 315, 328 (1977), in light of the findings of fact heretofore made, the record in this case, and the court's own observations, knowledge, experience, and expertise.

IT IS THEREFORE ORDERED that the City of Long Beach pay to petitioners' counsel the total sum of $36,773.85 as and for attorney's fees and costs in accordance with 42 U.S.C. § 1988.

Dated: MAR 09 1990

JACK M. NEWMAN
JUDGE OF THE
SUPERIOR COURT

93-727

Supreme Court, U.S.
FILED
NOV 8 1993
OFFICE OF THE CLERK

No. _____

United States Supreme Court
October Term 1993

State of California,

Petitioner.

Jose Ronillo Abogado LUCERO,
Jimmie JOHNSON,
WALNUT PROPERTIES, INC.,
a California Corporation,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Seven

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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148 pp

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INDEX TO APPENDICES

Appendix #	Page
APPENDIX # 1 (Lucero I) People v. Superior Court (Lucero) (1989) 49 Cal.3d 14 [259 Cal.Rptr. 740, 774 P.2d 769]	 xv
APPENDIX # 2 (Lucero II) Lucero v. Municipal Court (People) (1993) 15 Cal.App.4th 784 [19 Cal.Rptr.2d 143]--"depublished" by order of the California Supreme Court August 12, 1993	 40
APPENDIX # 3 Order of California Supreme Court, August 12, 1993, denying hearing and "depublishing" Lucero II	 62
APPENDIX # 4 Respondents' original Petition for Writ of Prohibition and/or Mandate in Lucero I	 64

APPENDIX # 5
Judgment for Peremptory
Writ of Mandate 79

APPENDIX # 6
Respondents' Request for
Attorney's Fees pursuant to
42 U.S.C. § 1988, commencing
Lucero II 84

TABLE OF AUTHORITIES

Authority — Page

Aday v. Superior Court, 55 Cal.2d 789, 13 Cal Rptr. 415 (1961) 107

Aday v. United States, 338 U.S. 447, 87 S.Ct. 2095 (1967) 107

Alberts v. California [Roth v. United States], 345 U.S. 476, 77 S.Ct. 1304 (1957) 106

Alegret v. Arnebergh, Civ. No. 70-170-ALS (C.D. Cal. 1970) 110

Austin v. Kentucky; [Redrup v. New York], 386 U.S. 757, 87 S.Ct. 1414 (1967) 106

Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 833 (1971) 108

Barrows v. Reddin, 301 F.Supp. 575 (C.D. Cal. 1971) 109

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971) 106

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 120

Bonnes v. Long (4th Cir. 1979) 599 F.2d 1316 . . 93

Books, Inc. v. United States, 388 U.S. 449, 87 S.Ct. 2098 (1967) 107

Brandon v. Holt (1985) 469 U.S. 464, 471-472, 105 S.Ct. 873, 877-878, 83 L.Ed.2d 878 54

Burton v. Municipal Court, 68 Cal.2d 684, 68 Cal.Rptr. 721 (1968) 8, 107

Burton v. Municipal Court, 68 Cal.2d 856, 16 Cal.Rptr. 889 (1961) 107

California Ass'n of the Physically Handicapped, Inc. v. FCC, 742 F.2d 667 (9th Cir. 1983) 111

California Ass'n of the Physically Handicapped, Inv. v. FCC, 778 F.2d 823 (D.C. Cir. 1985) 111

California Paralyzed Veterans Ass'n v. FCC, 496 F.Supp. 125 (C.D. Cal. 1980) 111

California v. Walnut Properties, Inc., 106 S. Ct. 230 (1985) 72

Carlisle v. Landon, 73 S.Ct. 1179 (Douglas, Circuit Justice, 1953) 106

Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) 121

Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), aff'd sub. nom. Widmar v. Vincent, 454 U.S. 263 (1981)123

Christy v. City of Ann Arbor (6th Cir. 1987) 824 F.2d 489, certiorari denied (1988) --- U.S. ---, 108 S.Ct. 1013, 98 L.Ed.2d 978 29-30

Cinema Classics Ltd. v. Busch, 339 F.Supp. 43 (C.D. Cal.) 109

Clayton v. McDonnell-Douglas Corp., 584 F.2d 980 (9th Cir. 1978) 119

CLR [Corp.] v. Henline [6th Cir. 1983] 702 F.2d [637] at 639 29

Corinth Publications, Inc v. Wesberry, 388 U.S. 448, 87 S.Ct. 2096 (1967) 107

Corsican Productions v. Pitchess, 388 F.2d 441 (9th Cir. 1964) 108

Crawford v. Board of Educatior., 458 U.S. 527 (1982) 152

Daniels v. McKinney (1983) 146 Cal.App.3d 42, 193 Cal.Rptr. 842 60

Davis v. Cinema Classic, Ltd., 409 U.S. 807, 93 S.Ct. 105 (1972) 109

Door v. Pitchess, No. 63-15-PH (C.D. Cal. 1963) 109

Edwards v. Maryland State Fair & Agric. Soc'y, 628 F.2d 282 (4th Cir. 1980) 121

El Patio v. Permanent Rent Control Bd., 110 Cal. App. 3d 915, 168 Cal. Rptr. 276 (1980) 122

Elysium, Inc. v. Olesen, No. 63-385-PH (C.D. Cal. 1963) 109

EWAP, Inc. v. City of Ontario, 177 Cal. App. 3d 1108, 1115-18, 223 Cal. Rptr. 422, 427-30 (1986) 96

Felton v. Pensacola, 390 U.S. 340, 88 S.Ct. 1098 (1968) 107

Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982) 121

Filipino Accountants' Ass'n v. State Bd. of Accountancy, 155 Cal. App. 3d 1023, 1031, 204 Cal. Rptr. 913, 917 (1984) 92

Flack v. Municipal Court, 66 Cal.2d 981, 59 Cal.Rptr. 872 (1967) 108

Friends of Westwood v. City of Los Angeles, 191 Cal. App 3d 259, 235 Cal. Rptr. 788 (1987) 122

Grant v. United States, 380 F.2d 748 (9th Cir. 1967) 108

Greater Los Angeles Council on Deafness v. Zolin, 607 F.Supp. 175 (C.D. Cal. 1984), aff'd in part, rev'd in part, 812 F.2d 1103 (9th Clr. 1987) 122

Green v. Obledo, 161 Cal. App 3d 678, 683, 207 Cal. Rptr. 830, 832 (1984) 97

Greer v. Holt (6th Cir.1983) 718 F.2d 206 56

Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965) 108

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974) 106

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) 121

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) 48, 95, 100

Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281 (1975) 106

Holy Spirit Ass'n for the Unification of World Christianity v. Alley, 604 F.2d 669 (5th Cir. 1979) 121

Hutto v. Finney (1978) 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 . . . . . 50-51, 54-55, 57

Imbler v. Pachtman (1976) 424 U.S. 409, 95 S.Ct. 984, 47 L.Ed.2d 128 50

In re Head (1986) 42 Cal.3d 223, 228 Cal.Rptr. 184, 821 P.2d 65 59-60

In re Lousiana News Co., 187 F.Supp. 241 (E.D. La. 1960) 109

Unification Church v. INS, 762 F.2d 1077 (D.C. Cir. 1985) 121

International Oceanic Enterprises v. Menton, 614 F.2d 502 (5th Cir. 1980) 121

International Soc'y for Krishna Consciousness v. Air Canada, 727 F.2d 253 (2d Cir. 1984) 121

International Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667 (7th Cir.), cert. denied, 444 U.S. 963 (1979) 122

International Soc'y for Krishna Consciousness v. Collins, 609 F.2d 151 (5th Cir. 1980) 121

International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984) 122

International Woodworkers Local 3-98 v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985) 102

James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944) 106

Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680 (1973) 106

Kentucky v. Graham (1985) 473 U.S. 159, 167, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 50

Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I) 110

Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985) (Kling II), rev'd, No. 85-295 (U.S. Nov. 4, 1985)

. 111

Kuhns v. Board of Supervisors (1982) 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1 . . . . . 3, 31 35-36

Larson v. Valente, 456 U.S. 228 (1982) 121

LeBaron v. Olesen, 125 F.Supp. 53 (S.D. Cal. 1954) 109

Lezama v. Justice Court (1987) 190 Cal.App. 3d 15, 24, 235 Cal.Rptr. 238 56

Luros v. United States, 490 F.2d 76 (5th Cir. 1974)109

McMahon v. Lopez, 199 Cal. App. 3d 829, 836, 245 Cal. Rptr. 172, 177 (1988) 93

Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376 (9th Cir. 1988) 121

Newman v. Piggie Park Enterprises, Inc.,390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)57, 93

Olney v. Municipal Court (1982) 133 Cal.App.3d 455, 184 Cal.Rptr. 78 60

Oreson v. Standard, 227 F.2d 785 (9th Cir. 1955) 108

Owen v. City of Independence (1980) 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 50

Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983) 102

Patterson v. Municipal Court (1965) 232 Cal.App.2d 289, 42 Cal.Rptr. 769 52

People v. Rossi, 81 Cal.3d 295, 134 Cal.Rptr. 64 (1976) 108

People v. Superior Court (Lucero) (1989) 49 Cal.3d 14, 27, 259 Cal.Rptr. 740, 774 P.2d 769 . . . . 46, 91, 96

People v. Walnut Properties, Inc., No CRA 16846 (Cal. Super. Ct. App. Dep't July 1, 1980). 70

People v. Walnut Properties, Inc., No. CRA 21481 (Cal. Super. Ct. App. Dep't Mar. 18, 1985) 71

Perkins v. Cross (8th Cir.1984) 728 F.2d 1099 . 56

Perlman v. Municipal Court (People), 88 Cal. App. 3d 568, 160 Cal. Rptr. 567 (1979) 122

Pomerantz v. County of Los Angeles, 674 F.2d 1288 (9th Cir. 1982) 111

Press v. Lucky Stores Inc., 34 Cal. 3d 311, 322, 667 P.2d 704, 710, 193 Cal. Rptr. 900, 906 (1983) . . 98

Pringle v. City of Covina (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251 . . . . . 3, 10, 24, 35, 43, 66, 69

Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723 (1964) 106-107

Quantity of Copies Books v. Kansas, 388 U.S. 452, 87 S.Ct. 2104 (1967) 108

Quantity of Copies of Books v. State, 191 Kan. 13, 379 P.2d 254 108

Rabeck v. New York, 391 U.S. 462, 88 S.Ct. 1716 (1968) 107

Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 55, fn. 4, 106 S.Ct. 925, 933, fn. 4, 89 L.Ed.2d 29

. . . . . 4, 12-13, 14-16, 18, 25-26, 29, 34

Rescue Army v. Municipal Court (1946) 28 Cal.2d 460, 171 P.2d 8 52

Riddle v. National Democratic Party (5th Cir. 1980) 624 F.2d 539, 543 93

Riley v. National Fed'n of the Blind, 108 S.Ct. 2267 (1988) 123

Rizzi v. Blount, 305 F.Supp. 634 (C.D. Cal. 1969) 110

Rose v. United States Postal Serv. 725 F.2d Adv. Sh. 1250 (9th Cir. 1984) 111

Roth v. United States (1957) 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 fn. omitted. 27, 106

Schad v. Mount Ephraim (1981) 452 U.S. 61, 69-70, 101 S.Ct. 2176, 2183-2184, 68 L.Ed.2d 671 29

Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) 123

Serrano v. Unruh (Serrano IV)., 32 Cal. 3d 621, 643, 652, P.2d 985, 999, 186 Cal. Rptr. 754, 768 (1982) 101

Shea v. Board of Medical Examiners (1978) 81 Cal.App.3d 564, 574, 146 Cal.Rptr. 653.) 18

Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) 106

Smith v. California, 375 U.S. 259, 84 S.Ct. 361 (1963) 107

Sokolow v. County of San Mateo, 213 Cal. App. 3d 231, 242, 261 Cal. Rptr. 520, 529 (1989) 95-96

Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985) 122

Stanard v. Olesen, 74 S.Ct. 768 (Douglas, Circuit Justice, 1958) 107

State v. Jackson, 224 Ore. 337 108

Steiner v. Hocke, 272 F.2d 384 (9th Cir. 1959) . 108

Strand Property Corp. v. Municipal Court (1983) 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 347 31-32, 35-37, 43

Supreme Court of Virginia v. Consumers Union of the United States, Inc. (1980) 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 51

Texas State Teachers Assn. v. Garland Independent School Dist. (1989) 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 47

Tiernan v. Trustees of the Cal. State Univ. & Colleges, 33 Cal. 3d 211, 188 Cal. Rptr. 115 (1982) 122

Toberoff v. Summerfield, 245 F.2d 360 (9th Cir. 1957); 256 F.2d (9th Cir. 1958) 108

Tollis, Inc. v. San Bernardino County (9th Cir.1987) 827 F.2d 1329 . . . . . 6, 15-16, 34

Town of Islip v. Caviglia (1988) 141 A.D.2d 148, 151, fn. 2, 532 N.Y.S.2d 783, 784-785, fn. 2.) 4

United States v. Arno, No. CR 70-224 (D. Ariz. 1971). 110

United States v. Bloom, No. 7144-WJF (C.D. Cal. 1971) 109

United States v. Frew, 187 F.Supp. 500 (E.D. Mich. 1960) 109

United States v. Frew/Laning, Crim. No. 39414 (E.D. Mich. 1963) 109

United States v. Linetsky, Crim. No 39798 (E.D. Mich.) 109

United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971) 106

Village of Schaumburg v. Citizens for a Better Environment, 44 U.S. 620 (1980) 123

Walker v. Wegner, 624 F.2d 60 (8th Cir. 1980) . 121

Walnut Properties v. City Council of the City of Long Beach (1980) 100 Cal.App.3d 1018, 1024, 161 Cal.Rptr. 411 . . . . . 7, 43

Walnut Properties v. Ussery (Cal.App.) 5, 44, 73

Welton v. City of Los Angeles (1976) 18 Cal.3d 497, 506, 134 Cal.Rptr. 668, 556 P.2d 1119 18

Westfall v. Board of Commr's., 477 F. Supp. 862 (N.D. Ga. 1979) 122

Westside Community for Independent Living v. Obledo, 33 Cal.3d 348, 188 Cal.Rptr. 873 111

Williams v. United States, 704 F.2d 1162 (9th Cir. 1983) 111

Wilson v. Stocker (10th Cir.1987) 819 F.2d 943 . 58

Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310.

. . . . . 2, 4, 7-9, 10-12, 15-16, 18-19, 25-28

APPENDIX # 1

(Lucero I)

People v. Superior Court (Lucero)
(1989) 49 Cal.3d 14
[259 Cal.Rptr. 740, 774 P.2d 769]

259 Cal.Rptr. 740 (Cal. 1989)

774 P.2d 769

49 Cal.3d 14

The PEOPLE, Petitioner

v.

The SUPERIOR COURT of Los Angeles County, Respondent;

Jose Ronillo Abogado LUCERO et al., Real Parties in Interest.

No. S002438.

Supreme Court of California.

June 29, 1989.

Rehearing Denied Aug. 24, 1989.

People sought writ of mandate to compel Superior Court to vacate judgment which had granted peremptory writ of mandate directing municipal court to sustain demurrers to charge of violation of adult theater zoning ordinance. The Court of Appeal, 244 Cal.Rptr. 502, denied request for writ of mandate. Review was granted, superseding opinion of court of Appeal. The Supreme Court, Lucas, C.J., held that: (1) ordinance would not be constitutional if interpreted to apply to a single use of a theater for showing adult films, but (2) ordinance was constitutional if applied to a regular and

substantial course of conduct.

Affirmed.

Mosk, J., filed an opinion concurring in part and dissenting in part.

Kennard, J., filed an opinion concurring in part and dissenting in part in which Broussard, J., joined.

LUCAS, Chief Justice.

This case involves the enforcement of a Long Beach zoning ordinance that prohibits the location of "adult entertainment businesses" (including adult motion picture theaters) within 500 feet of residential areas, or 1,000 feet of public schools or churches (Long Beach Mun. Code, ch. 21.51, hereafter Chapter 21.51). The ordinance is described as a "non-cluster" or "Anti-skid Row" ordinance because it is designed to discourage development of a "skid row" area by limiting the harmful secondary effects of adult entertainment businesses on adjacent areas, and by insuring such businesses do not contribute to the blighting of surrounding neighborhoods. (See Chapter 21.51.010, "Purpose.") It was patterned after a Detroit adult entertainment zoning ordinance upheld in *Young v. American Mini Theaters, Inc.* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310.

The question before us concerns the appropriate constitutional standard by which to define the "use" necessary to make a movie theater an "adult motion

picture theater" within the meaning of the ordinance.[1] In *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251 the Court of Appeal held that an adult entertainment zoning ordinance cannot be enforced against an adult motion picture theater unless a "preponderance" (meaning "more often than not") of the "adult" films shown by the establishment have as their dominant theme the depiction of the ordinance's enumerated sexual activities.

In following *Pringle*, subsequent cases interpreting adult entertainment ordinances have required "use" to be defined as "over 50 percent." (*Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47 [construing "use" defined under the ordinance as a substantial or significant portion of the total presentation time to mean a "preponderance" that must be defined as "over 50 percent"]; *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1 [construing "use" defined as a "substantial or significant portion of stock in trade" in adult bookstore ordinance to mean "over half of a bookstore's stock"].) Moreover, the present Court of Appeal believed the People were bound by *Pringle*'s preponderance standard. (Post, at p. 742-743 of 259 Cal.Rptr., at p. 771-772 of 774 P.2d) We disagree. As we explain, although municipalities are free to adopt such a test in defining "use" under an adult entertainment

---

[1] The ordinance defines an adult motion picture theater as "an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein." (Chapter 21.51, § 21.51.020, subd. (A)(2).) Chapter 21.51 is set forth in the appendix.

ordinance, we conclude *Pringle*'s preponderance standard in not constitutionally compelled. In place of such a test, we adopt a constitutional standard similar to that recently approved by the United Stated Supreme Court and several state courts: cities may zone the location of theaters that show, on a regular basis, films characterized by an emphasis on the "specified anatomical areas" identified in the ordinance, where such films constitute a substantial portion of the films shown or account for a substantial part of the revenues derived from the exhibition of films (hereafter "the regular and substantial course of conduct" standard). (See, e.g., *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 55, fn. 4, 106 S.Ct. 925, 933, fn. 4, 89 L.Ed.2d 29; *Young*, supra, 427 U.S. at p. 59, 96 S.Ct. at p. 2447; see also *Town of Islip v. Caviglia* (1988) 141 A.D.2d 148, 151, fn. 2, 532 N.Y.S.2d 783, 784-785, fn. 2.)

I. *Facts*

Real parties in interest Jose Ronillo Abogado Lucero, Walnut Properties, Inc., and Jimmie Johnson (hereafter real parties were charged in separate misdemeanor complaints with numerous counts of unlawfully establishing an adult entertainment business in violation of Chapter 21.51.

Real parties' establishment, the Lakewood Theater, has two screens: one screen shows general release films and one screen shows adult films. Each count of the misdemeanor complaints specifically alleged real parties unlawfully established an adult theater in violation of Chapter 21.51 by exhibiting an X-rated movie on a particular day within the distances proscribed by the ordinance.

Real parties filed demurrers to the complaints on the ground that exhibition of a single adult film, as alleged in the complaints, did not make the theater an adult entertainment business under the preponderance standard established by *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251. After the municipal court overruled the demurrers, real parties petitioned the superior court for a peremptory writ of mandate directing the lower court to sustain the demurrers. The superior court granted the writ with leave to amend. The People declined to amend and instead requested the Court of Appeal to issue a writ of mandate to compel the superior court to vacate its judgment.

[1] The Court of Appeal denied the writ and rejected the People's contention that a *single* showing of an adult film makes the theater an adult motion picture theater within the meaning of the zoning ordinance. The court first rejected the People's argument that the "single use" standard adopted by the Court of Appeal in Walnut Properties v. Ussery (Cal.App.)[2] should control the outcome of the present litigation under the law of the case and collateral estoppel doctrines.[3]

---

[2] We ordered the opinion not published in the Official Reports by order dated June 24, 1986 (B005781).

[3] The *Ussery* case involved the same parties, theater and ordinance as in the present case. The court in *Ussery* observed that the only way to prevent the undesirable effects of adult theaters on the surrounding neighborhoods, and to implement the zoning ordinance according to the intent of its drafters, was to prohibit any use of the theater for showing adult motion pictures.

In rejecting the People's law-of-the-case and collateral estoppel arguments, the Court of Appeal observed, "[t]he cases before us are criminal ones

Next, in rejecting the People's contention that a "single use" standard should apply, the Court of Appeal cited with approval *Tollis, Inc. v. San Bernardino County* (9th Cir.1987) 827 F.2d 1329, which held that a "single use" interpretation of an adult entertainment zoning ordinance was unconstitutional in the absence of evidence "that a single showing of an adult movie would have any harmful secondary effects on the community." (Id. at p. 1333.) The Court of Appeal then denied the People's petition for writ of mandate because the complaints "did not allege, in accordance with the requirements of *Pringle*, that the preponderance of films exhibited and observed by patrons at the Lakewood Theatre were 'distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specific anatomical areas' (Chapter 21.51.020(A) . . .) as those terms are defined in Chapter 21.51.020(B)(1-7) and

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instituted well after *Ussery*, a civil case, became final. Because the criminal cases presently before us and *Ussery* are not the 'same case' the doctrine of law of the case does not apply." We agree. We also agree with the Court of Appeal's decision not to apply the collateral estoppel doctrine to defendants. First, it is highly questionable whether a prior determination against a party in a civil action may be applied as a collateral estoppel against that same party in a criminal action. (See *Ashe v. Swenson* (1970) 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469.) In addition, as the Court of Appeal observed: "[I]f *Ussery* were given collateral estoppel effect in this case the single instance standard would apply to Lakewood Theater and the preponderance standard enunciated in *Pringle* [115 Cal.App.3d 151, 171 Cal.Rptr. 251] which is the only published decision on this issue would apply to all other theaters. Such a result would clearly be unjust and would disserve the public interest. (See *Consumers Lobby Against Monopolies v. Public Utils. Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)"

(C)(1-2) of the Long Beach Municipal Code.) In reviewing the Court of Appeal opinion, we examine the People's argument requesting we affirm as constitutionally permissible a "single use" standard.

II. *Background*

A. Constitutionality of adult entertainment zoning

In August 1977 Walnut Properties, Inc. (hereafter Walnut) obtained a business license to operate a motion picture theater on the representation that it intended to exhibit nonadult films. (*Walnut Properties v. City Council of the City of Long Beach* (1980) 100 Cal.App.3d 1018, 1024, 161 Cal.Rptr. 411.) In November of that year, following the high court's decision in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, the city enacted Municipal Code Chapter 9120.41, which was amended in 1979 to become Chapter 21.51, the ordinance at issue in the present case. The 1979 ordinance is substantially similar to the 1977 version -- its primary purpose being to regulate the location of adult motion picture theaters. After the ordinance was passed Walnut began showing adult films.

In December 1977, shortly after Walnut opened its theater, the Long Beach City Council instituted proceedings culminating in the revocation of Walnut's operating license. Walnut sued the city, challenging the constitutionality of the ordinance. (*Walnut Properties*, supra, 100 Cal.App.3d at p. 1020, 161 Cal.Rptr. 411.) After conceding that its theater was an "adult entertainment business" as defined by the ordinance, Walnut argued the ordinance violated the First Amendment's freedom of speech clause as an unconstitutional regulation of constitutionally protected

conduct. In addition, Walnut claimed that the ordinance was vague, overbroad and vested public officials with impermissible discretion to enforce its terms. (Id. at p. 1021, 161 Cal.Rptr. 411; see, e.g., *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 68 Cal.Rptr. 721, 441 P.2d 281.) The ordinance survived constitutional scrutiny, however, after the Court of Appeal found *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, dispositive of the constitutional issues. (*Walnut Properties*, supra, 100 Cal.App.3d at p. 1023, 161 Cal.Rptr. 411.)

[2] The two Detroit ordinances at issue in *Young* were termed "Anti-skid Row" ordinances because they prohibited (except where a special waiver was obtained) locating adult theaters and adult bookstores with 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone. The ordinances' definition of an "adult motion picture theater" was identical to that of the Long Beach ordinance we discuss here. (*Young*, supra, 427 U.S. at pp. 53-54, fn. 5, 96 S.Ct. at pp. 2444-2445, fn. 5.)

The plurality, led by Justice Stevens, upheld the ordinances on the basis they were not directed at restricting speech, but rather were reasonable time, place and manner regulations necessary to further the city's significant interest in preserving the character of its neighborhoods. The *Young* court concluded that as long as such ordinances were enacted to regulate the location of adult theaters in order to protect neighborhoods from deterioration, increased crime and other harmful secondary effects, they did not offend either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. (*Young*, supra, 427 U.S. 50, 68-73, 96 S.Ct. 2440, 2451-2454; see *Developments in the Law*

-- *Zoning* (1978) 91 Harv.L.Rev. 1427, 1557-1559.)[4]

Based on the high court's reasoning in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, the *Walnut Properties* Court of Appeal rejected Walnut's First Amendment

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[4] The *Young* court noted that under the ordinances "adult films may only be exhibited commercially in licensed theaters.) (*Young*, *supra*, 427 U.S. at p. 62, 96 S.Ct. at p. 2448.) The court observed, however, that the "city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specific commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." (Ibid.)

The *Young* court also rejected the theater owner's vagueness attack on the ordinances on the basis that "Neither respondent . . . alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater." (*Young*, *supra*, 427 U.S. at p. 59, 96 S.Ct. at p. 2447.) The court observed that "the only vagueness in the ordinances related to the amount of sexually explicit activity that may be portrayed before the material can be said to be 'characterized by an emphasis' on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state court's . . . . [W]e think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court." (Id. at p. 61, 96 S.Ct. at p. 2448.)

Finally, the court held that the Detroit ordinance created no "significant deterrent effect" that would justify invocation of the First Amendment "overbreadth" doctrine. (*Young*, *supra*, 427 U.S. at pp. 59-60, 96 S.Ct. at pp. 2446-2447.)

argument. The court reasoned, "It is clearly within the power of the City to provide that *no* motion picture theatre can be operated in a residential area or near a public school. The thrust of Justice Stevens' opinion in *Young* was that it was also within the City's power to classify theatres according to the content of the films exhibited, so long as that classification has a reasonable basis. The 'adult entertainment' classification is a reasonable one. [¶] Walnut has presented no evidence that the City's ordinance in any way restricts or eliminates the access to the 'adult entertainment' for those persons who desire to patronize it. In fact, Walnut operates another such theater in a different part of the City. From records which we may judicially notice, it appears that Long Beach has a number of 'adult' forms of entertainment operating within its boundaries." (*Walnut Properties*, supra, 100 Cal.App.3d 1018, 1023, 161 Cal.Rptr. 411.)

B. *Pringle's "preponderance" standard*

In *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, the City of Covina had enacted a "non-cluster" zoning ordinance prohibiting location of adult entertainment theaters within 500 feet of residential and other enumerated areas. The ordinance employed a substantially similar definition of an adult theater as the Long Beach ordinance we review herein. (Post, at fn. 1; see Covina Mun.Code, § 17.04.026.2.) The ordinance declared its purpose was "'to insure that adverse effects [arising from the "serious objectionable operational characteristics" of adult theaters] will not contribute to the blighting or downgrading of the surrounding neighborhood and will not unreasonably interfere with or injure nearby properties.'" (Id. at p. 154, 171 Cal.Rptr.

251, quoting from Covina Mun.Code, § 17.04.026.2.)

The plaintiffs, a neighborhood theater owner and a patron, instituted an action for declaratory and injunctive relief "alleging that the ordinance violated federal and state guarantees of freedom of speech, due process and equal protection. They claimed that the ordinance was unconstitutional on its face and, as construed to apply 'to the operation of a neighborhood theater which shows a variety of films including a few films which, although not obscene, explicitly depict sexual activity arguable within the scope of the ordinance.' They further argued that the terms 'distinguished or characterized by an emphasis' and 'used' were too vague and chilled freedom of expression." (*Pringle*, supra, 115 Cal.App.3d at p. 155, 171 Cal.Rptr. 251.) The defendant city argued that the ordinance was valid under *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and asserted that the term "use" should be construed as meaning "'[o]ne showing of a film described in the ordinance.'" (*Pringle*, supra, 115 Cal.App.3d at p. 156, 171 Cal.Rptr. 251.)

The *Pringle* court recognized that it was faced "with an actual, not hypothetical, claim of uncertainty deterring the exercise of protected speech" (115 Cal.App. 3d at p. 160, 171 Cal.Rptr. 251), and that it was bound to construe the legislation "if reasonably possible to preserve its constitutionality." The court first construed the ordinance's applicability regarding the dominant or essential theme of the movie. (At p. 160, 171 Cal.Rptr. 251.) It concluded that "adult films under the ordinance include only films whose dominant or predominant character and theme is the depiction of the enumerated sexual activities or anatomical areas." (Ibid.)

Next, the court determined that the word "used" in

the "ordinance's definition of an adult theater as a building 'used for presenting' sexually explicit material" rendered the ordinance vague -- and hence constitutionally infirm -- because it failed to indicate "what proportion of a theatre's programming would constitute 'use.'" (*Pringle* court defined "use" under the ordinance to mean "to practice customarily," but qualified the phrase to mean "more often than not." Based on the foregoing, the court adopted a "preponderance" standard. (Id. at p. 162, 171 Cal.Rptr. 251.)

C. Post-Young federal cases

Two federal decisions decided after *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, shed further light on the interpretation of language similar to that at issue here. Both involved constitutional challenges to adult entertainment zoning ordinances similar to the one examined by the court in *Young*.

In *Renton v. Playtime Theatres, Inc.*, supra, 475 U.S. 41, 106 S.Ct. 925, two theater operators whose theaters exhibited adult films and were located within an area proscribed by adult entertainment zoning restrictions challenged the Renton ordinance under the First and Fourteenth Amendments. The high court determined that the ordinance was a valid "time, place and manner" measure because it did "not ban adult theaters altogether, but merely provide[d] that such theaters [could] not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." (Id. at p. 46, 106 S.Ct. at p. 928.) Next, while recognizing that the Renton ordinance treated "theaters that specialize in adult films differently from other kinds of theaters" (id. at p. 47, 106 S.Ct. at p. 929), the court observed that the

regulation "was unrelated to the suppression of free expression" because it did not proscribe the content of the films, but rather was concerned predominately with the deleterious secondary effects of adult theaters on the neighboring community. (Ibid.)

In concluding that the ordinance was "designed to serve a substantial government interest and allow[ed] for reasonable alternative avenues of communication," the *Renton* court stated that the city's substantial interest in preserving "'the quality of urban life'" justified the enactment. (*Renton*, supra, 475 U.S. at p. 50, 106 S.Ct. at p. 930.) Moreover, the court observed that it was appropriate for Renton to have relied on relevant studies conducted by other cities on the need for zoning controls of adult theaters in order to establish its "substantial government interest" in regulating adult theaters. (Id. pp. 51-52, 106 S.Ct. at pp. 930-931.)[5]

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[5] The *Renton* court specifically stated that "Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema [Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978)] opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." (Id. 475 U.S. at pp. 50-52, 106 S.Ct. at pp. 930-931.)

Finally, the court observed that the method chosen by a city to further its substantial interests -- e.g., cluster as opposed to noncluster zoning -- would not affect its holding. The court noted that "cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton, 'It is not our

The court further noted that the Renton ordinance left approximately 520 acres open to use as potential adult theater locations. Accordingly, the court determined the ordinance would allow "for reasonable alternative avenues of communication."[6] (*Renton*, supra, 475 U.S. at p. 53, 106 S.Ct. at p. 932.) Thus, the court concluded, the ordinance represented a valid governmental response to the serious problems created by adult theaters and met the goals of the city in preserving the quality of life within the community while "satisfying the dictates of the First Amendment." (Id. at pp. 54-55, 16 S.Ct. at pp. 932-933.)

Thereafter, in 1987, an operator of an adult motion picture establishment challenged, in federal court, the constitutionality of a San Bernardino County ordinance similar in language and substance to the "Anti-skid Row"

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function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" (Id. at p. 52, 106 S.Ct. at p. 931, quoting *Young, supra*, 427 U.S. at p. 71, 96 S.Ct. at p. 2453, original brackets.)

[6] In response to the theater owner's (respondents) argument that there were no "commercially viable" adult theater sites within the 520 acres left available by the Renton ordinance, the court observed that "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.
. . . In our view, the First Amendment required only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." (*Renton*, supra, 475 U.S. at p. 54, 106 S.Ct. at p. 932.)

ordinances discussed above, with the exception that the ordinance was silent as to its predominate purpose. (*Tollis, Inc. v. San Bernardino County*, supra, 827 F.2d 1329, 1332.) The county argued that the ordinance should be construed so as to prohibit even a "single showing" of an adult motion picture. The theater owner responded that such construction would be unconstitutionally overbroad on its face under *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925. (*Tollis*, supra, 827 F.2d at p. 1331.)

[3] The Ninth Circuit agreed with the theater owner and found that a "single use" standard could not pass "constitutional muster as a content-neutral time, place, and manner regulation" because it could not be justified as serving a substantial governmental interest in preserving the quality of urban life. (*Tollis*, supra, 827 F.2d at pp. 1332-1333.) As we explain below, we believe, like the *Tollis* court, that so construed the Long Beach ordinance would be unconstitutional.

III. A *constitutional zoning standard*

Although *Tollis*, supra, 827 F.2d 1329, is not dispositive, we believe it applied the correct constitutional principal first articulated in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and developed by *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925. As *Tollis* recognized, *Renton* required the court to determine whether the ordinance, as implemented, is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. (*Tollis*, supra, 827 F.2d at pp. 1332-1333.) Like the Ninth Circuit, we find a "single use" standard is insufficiently tailored to serve

Long Beach's stated purpose of preventing the clustering or concentration of adult motion picture theaters in any one area. Nothing in the Long Beach ordinance's statement of purpose discloses the presence of significant deleterious effects on the community arising out of a single showing of an adult film. We also agree with the *Tollis* court that a single showing of an adult movie does not necessarily create the "logical relationship between the evil feared and the method selected to combat it." (Id. at pp. 1332-1333.)[7]

Nor do we believe, however, that *Pringle*'s preponderance standard is constitutionally compelled. As stated above, *Pringle* would allow the zoning of adult theaters only if a preponderance (construed to mean "more often than not" or "most often") of the films shown have as their dominant theme the depiction of the ordinance's enumerated sexual activities. (*Pringle*, supra, 115 Cal.App.3d at p. 162, 171 Cal.Rptr. 251.) We find nothing in the high court's cases suggesting such a standard is required. Indeed, a preponderance standard violates the spirit of the high court's cases. Those decisions expressly recognize a state's legitimate interest in regulating adult entertainment establishments, and accord local governments substantial discretion in defining the scope and nature of such regulation. (*Young*, supra, 427 U.S. at p. 61, 96 S.Ct. at p. 2448; *Renton*, supra, 475 U.S. at pp. 51-52, 106 S.Ct. at pp. 930-931.)

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[7] Real parties argue that if we were to impose a single use standard in this case, the procedures for obtaining a waiver would operate as an invalid prior restraint on theater owners. Because we reject the "single use" standard as unconstitutional on other grounds, we need not consider the merits of this claim.

Accordingly, we conclude that *Pringle*, in striving to construe the term "used" within the confines of constitutional principles, established a standard that is too high.[8]

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[8] The exact basis of the *Pringle* decision is not entirely clear. To the extent *Pringle* may be interpreted as a constitutional "floor" in the traditional sense (i.e., that the municipalities are constitutionally precluded from regulating theaters showing less than a preponderance of adult films), we believe it to be inconsistent with the basic principles of *Young* and *Renton* and unduly restrictive of the municipalities' legitimate interest in regulating adult entertainment establishments. (See post, fn. 10.) It defies common sense to hold that a theater exhibiting (adult" films during less than 51 percent of its total operating time *must* be treated as something other than an adult establishment as that term can be reasonably understood in this context. Nonetheless, so long as the theater does not "preponderantly" or "more often than not" exhibit adult movies, *Pringle's* test allows adult entertainment theaters to be established in contravention of the purpose of the ordinance.

Moreover, to the extent *Pringle* may be interpreted as an exercise of simple statutory construction, we find it equally flawed. The *Pringle* court correctly noted that vague or ambiguous terms in a legislation are to be construed, where possible, so as to preserve their constitutionality. (*Pringle*, *supra*, 115 Cal.App.3d at p. 160, 171 Cal.Rptr. 251.) In so doing, however, the court must give the ordinance a construction which conforms both to the dictates of the Constitution and to the purposes of the enactment. Indeed, we believe the "regular and substantial course of conduct" is a reasonable interpretation of "use" under the Long Beach ordinance because it more closely conforms to the purpose of the ordinance than did *Pringle's* preponderance (over 50%) test. Accordingly, we must reject *Pringle* on statutory construction grounds as well.

The question then becomes whether we can articulate a constitutional standard that will both implement the purpose of the ordinance and abide by the requirements of *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925 (i.e., that an ordinance be content-neutral and narrowly tailored to minimize only the adverse secondary effects related to adult entertainment establishments). The Long Beach ordinance was passed specifically because "[T]he city council [found] that adult entertainment businesses, because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special locational regulation of these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area." (Long Beach Mun. Ord. C-5487 § 1 (1979).)

[4] Because adult entertainment ordinances are aimed at regulating the clustered establishment of adult entertainment businesses and not at prohibiting theater owners from occasionally exhibiting an "adult" film, we conclude a "regular and substantial course of conduct" standard must appropriately defines the constitutional level of "use" for purposes of such ordinances. In so doing, we allow cities a greater flexibility in the zoning of adult entertainment theaters, thereby construing the ordinance in a constitutional manner while allowing a reasonable and practical construction in conformity with the purpose of the enactment. (*Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 506, 134 Cal.Rptr. 668, 556 P.2d 1119; *Shea v. Board of Medical Examiners* (1978) 81

Cal.App.3d 564, 574, 146 Cal.Rptr. 653.)

By interpreting the term "used" in this case to mean a "regular and substantial course of conduct," we give the ordinance a construction that is rationally tailored to support its asserted purpose of preventing neighborhood blight without allowing Long Beach to use "the power to zone as a pretext for suppressing expression." (*Young*, supra, 427 U.S. at p. 84, 96 S.Ct. at p. 2459.) Under this standard, zoning restrictions such as contained in the ordinance at issue here would apply to all adult entertainment theaters offering adult fare as a substantial part of their regular business, but would not apply to theaters showing only occasional or incidental adult movies.[9] To the extent *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, conflicts with the foregoing standard, the case is disapproved.[10]

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[9] We recognize that although our definition is not exact, it is "reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." (*Hart Book Stores, Inc. v. Edmisten* (4th Cir. 1979) 612 F.2d 821, 833, cert. den. (1980) 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124.) We emphasize Long Beach is free to further define the standard -- for example, by making reference to a percentage of films shown, or the percentage of revenue received by the adult entertainment business. It may also amend its ordinance to impose less restrictive standards.

[10] As stated above *Pringle's* "preponderance" standard has been interpreted in Court of Appeal cases as requiring the showing of over 50 percent adult movies before a theater can be labeled an adult theater: *Kuhns v. Board of Supervisors*, supra, 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1; Strand Property Corp. v. Municipal Court, supra, 148 Cal.App.3d 882, 889-890, 200 Cal.Rptr. 47. These cases predate *Renton, supra*,

IV. *Disposition*

The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional "single use" standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal is affirmed.[11]

PANELLI, EAGLESON and KAUFMAN, JJ., concur.

APPENDIX

LONG BEACH MUNICIPAL CODE
CHAPTER 21.51

SECTION 21.51.010 PURPOSE.

The city council finds that adult entertainment businesses because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special locational regulation of

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475 U.S. 41, 106 S.Ct. 925, and merely rely on *Pringle*. To the extent they interpret *Pringle* as imposing a constitutional floor, we find they are no more persuasive than *Pringle*, *supra*, and are likewise disapproved.

[11] Of course, our disposition does not preclude the People from prosecuting future violations of Chapter 21.51 under the "regular and substantial course of conduct" standard discussed above.

these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area. This chapter shall be deemed a reenactment of the preexisting ordinance on this subject matter. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(a)).

SECTION 21.51.020 DEFINITIONS.

A. For purposes of this chapter, the adult entertainment businesses are defined as follows:

2. "Adult motion picture theater" means an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

B. For purposes of this chapter, "specified sexual activities" shall include the following:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following depicted sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence; or

3. Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

4. Fondling or touching of nude human genitals, pubic region, buttocks or female breast; or

5. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

6. Erotic or lewd touching, fondling or other contact with an animal by a human being; or

7. Human excretion, urination, menstruation, vaginal or anal irrigation.

C. For purposes of this chapter, "specified anatomical areas" shall include the following:

1. Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(b)).

SECTION 21.51.030 LOCATION RESTRICTED.

A. In those land use districts where the adult entertainment businesses regulated by this chapter would otherwise be permitted uses, it shall be unlawful to establish any such adult entertainment business if the location is:

1. Within five hundred feet of any area zoned

for residential use;

2. Within one thousand feet of any other adult entertainment business; or

3. Within one thousand feet of any public or private school, park, playground, public building, church, any noncommercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors.

B. The establishment of any adult entertainment business shall include the opening of such a business as a new business, the relocation of the business, or the conversion of an existing business location to any adult entertainment business use. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(c)).

SECTION 21.51.040 VARIANCE

A. Any property owner or his authorized agent may apply for relief from the locational provisions of this chapter by applying for a standards variance as provided in this title. To grant such a request the following additional findings must be made:

1. That the proposed use will not be contrary to the public interest or injurious to nearby properties and that the spirit and intent of this chapter will be observed;

2. That the proposed use will not enlarge or encourage the development of a skid row area;

3. That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere

with any program of urban renewal; and

4. That all applicable regulations of the municipal code will be observed.

B. The procedure for this hearing shall be the same as that provided for a standards variance in this title. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(d)).

MOSK, Associate Justice, concurring and dissenting.

I

I concur in the judgment.

The majority correctly strike down the "single use" standard as unconstitutional. They err, however by jettisoning the "preponderance" standard in use for the past eight years and creating an entirely new and vague "regular and substantial course of conduct" standard. I therefore dissent from that portion of the opinion.

The majority read the decision of *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251, too broadly; it does not establish the preponderance standard as the limit of regulatory power for every locality in the state. Moreover, it is inappropriate to weave a new standard -- one which apparently is meant to set a statewide regulatory floor -- out of whole cloth. To do so the majority must reach out to decide this issue without the benefit of a developed record, without the benefit of briefing, and, most importantly, in contravention of the spirit of United States Supreme Court decisions that emphasize the importance of allowing cities to experiment

with various solutions to the serious problems created by urban blight. (See, e.g., *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (hereafter *Renton*); *Young v. American Mini Theatres* (1976) 427 U.S. 50, 71, 96 S.Ct. 2440, 2452-2453, 49 L.Ed.2d 310 (hereafter *Young*).)

The result is judicial legislating. Creation of the "regular and substantial course of conduct" standard is unjustified because we have been presented with no evidence that the new untested standard would ameliorate the secondary effects of adult-oriented businesses while accommodating individuals' access to communications protected by the free speech provisions of the federal and state Constitutions.

II

Two interests collide when a city undertakes to pass zoning laws regulating so-called "adult entertainment businesses": (1) individuals' right to receive, and owners' right to convey, nonobscene communication protected by the state and federal Constitutions, and (2) the city's interest in eradicating urban blight. Among the more serious perceived negative secondary effects of such entertainment businesses are increased crime, particularly prostitution, deteriorating neighborhoods, and economic injury to nearby businesses. (See generally, *Developments in the Law -- Zoning* (1978) 91 Harv.L.Rev. 1427, 1551 (hereafter *Zoning*).) No one can doubt that these serious problems are a legitimate subject of local government concern. Many cities across the nation are expending considerable resources to rejuvenate long-neglected downtown areas. These efforts take a variety of forms: some cities pass zoning laws that disperse regulated uses throughout the locality; other zoning laws are aimed at

clustering the uses in limited areas; some cities regulate the operating hours and storefront advertising of so-called adult-oriented businesses; still others rely on public nuisance laws. The Supreme Court has repeatedly emphasized that courts must allow cities "'a reasonable opportunity to experiment with solutions to [these] admittedly serious problems.'" (*Renton*, supra, 475 U.S. at p. 52, 106 S.Ct. at p. 931, quoting *Young*, supra, 427 U.S. at p. 71, 96 S.Ct. at p. 2452 (plur. opn.).)

But courts must also protect individuals' rights to freedom of speech, the cornerstone of a democratic society. The federal Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ." (U.S. Const., 1st Amend.) The California Constitution declares the same right in the affirmative: "Every person may freely speak, write and publish his or her sentiments on all subjects . . . ." (Cal.Const., art. I, § 2, subd. (a).) That the communication involved here pertains to sex does not mean that it deserves less than full constitutional protection.[1] "[Sex and obscenity are not

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[1] Some commentators argue that constitutional protection should be afforded only to explicitly political speech, and not to scientific or literary speech. (see, e.g., Bork, Neutral Principles and Some First Amendment Problems (1970) 47 Ind. L.J. 1.) Justice Stevens, writing for the plurality in *Young*, suggested that "erotic materials" were not entitled to the same measure of constitutional protection as "political debate." (427 U.S. at pp. 61, 70, 96 S.Ct. at pp. 2448, 2452.) Fortunately, these views have not prevailed. (Nimmer on Freedom of Speech (1984) § 3.01.) A majority of justices in *Young* concluded that nonobscene erotic materials may not be treated differently under First Amendment principles from other forms of protected expression. (427 U.S. at p. 73, fn. 1, 96 S.Ct. at p. 2453, fn. 1 (Powell, J., concurring), pp. 85-87, 96 S.Ct. at pp. 2459-

synonymous . . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (*Roth v. United States* (1957) 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 fn. omitted.) These words, although written over three decades ago, still have relevance today, although to the examples must be added stage and screen presentations.

Neither of the conflicting interests, the Supreme Court has explained, is absolute. A city may, under certain circumstances, pass zoning regulations that impair the First Amendment rights of theater owners and their customers. In the seminal *Young* case, supra, 427 U.S. 50, 96 S.Ct. 2440, a sharply divided court upheld a Detroit ordinance that prohibited adult theaters from locating within 1,000 feet of any 2 other "regular uses," such as motels, liquor stores and adult bookstores, or within 500 feet of a residential area. Preliminarily, the court refused to consider a vagueness challenge to the ordinance's definition of adult motion picture: the plaintiff theater owners lacked standing to raise the challenge because they plainly intended to exhibit the type of motion pictures clearly covered by the definition, i.e., "distinguished or

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2461 (Stewart, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ.).) This latter position is consonant with the state constitutional dictate that persons may speak freely "on all subjects." (Cal.Const., art. I, § 2, subd. (a).) The Oregon Supreme Court reached the same conclusion in its colorful opinion in *State v. Henry* (1987) 302 Or. 510, 525, 732 P.2d 9, 17-18.

characterized by an emphasis on" on certain listed sexual activities or anatomical areas. (Id. at p. 59, fn. 16, 96 S.Ct. at p.. 2447, fn. 16.)

Turning to the merits, the court relied on three factors in rejecting the plaintiffs' equal protection challenge. One, the ordinance did not greatly restrict access to "lawful speech." (*Young*, supra, 427 U.S. at p. 71, fn. 35, 96 S.Ct. at p. 2453, fn. 35 (plur. opn.), pp. 77, 79, 96 S.Ct. at pp. 2455, 2456 (conc. opn. of Powell, J.).) Two, the intent of the city in passing the ordinance was to ameliorate the negative secondary effects of adult entertainment businesses, not to suppress "offensive" speech. (Id. at p. 71, fn. 34, 96 S.Ct. at p. 2453, fn. 34)plur. opn.), pp. 80-81, 96 S.Ct. at pp. 2457-2458 (conc. opn. of Powell, J.).) Three, the record disclosed a factual basis for the city's conclusion that the type of restriction it imposed would have the desired effect. (Id. at p. 71, 96 S.Ct. at p. 2452 (plur. opn.), p. 82, 96 S.Ct. at p. 2458 (conc. opn. of Powell, J.).)

In dictum, a majority of this court now create a new standard that does violence to both free speech principles and cities' interest in tailoring zoning regulations to local circumstances. If the "regular and substantial course of conduct" standard were adopted by a legislative body in the same unstudied manner as it is suggested by the majority, courts would be required to strike it down because it fails to meet the *Young* criteria. Because the case comes to us on demurrer there is no evidence in the record that the new standard would allow substantially unimpeded access to protected speech. Moreover, there is absolutely no factual basis for the majority's surmise that a "regular and substantial course of conduct" standard will substantially assist Long Beach or any other city to fight urban blight.

In most cases, courts are not required to examine the legislative record or to inquire into legislator's motives when reviewing a statute or ordinance. When the legislation impairs the right to freedom of speech, however, "courts should continue to undertake more than a cursory, deferential examination of the factual bases of the municipality's decision. Courts sensitive to the first amendment issues at stake should insist upon a fairly complete record of the evidence available to municipal legislators at the time they acted and of the facts on which they relied . . . ." (*Zoning*, op. cit. supra, 91 Harv.L.Rev. at p. 1559; see also *Schad v. Mount Ephraim* (1981) 452 U.S. 61, 69-70, 101 S.Ct. 2176, 2183-2184, 68 L.Ed.2d 671.) In *Christy v. City of Ann Arbor* (6th Cir. 1987) 824 F.2d 489, certiorari denied (1988) ___ U.S. ___, 108 S.Ct. 1013, 98 L.Ed.2d 978, the court examined an ordinance that defined an adult bookstore as an establishment having as a "principal activity" the sale of books or films characterized by an emphasis on certain enumerated sexual activities. "Principal activity" was in turn defined as a "use accounting for more than 20 per cent of a business." The court of appeals vacated the district court's order denying the plaintiff bookseller's motion for preliminary injunction and remanded the case for further proceedings.

After carefully examining the record, the court of appeals held, "Although both the Supreme Court in *Renton*, 106 S.Ct. at 931, and the Sixth Circuit in *CLR [Corp.] v. Henline* [6th Cir. 1983] 702 F.2d [637] at 639, have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required *some relevant evidence* to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses. The burden of proof is on the city to show that more than a

rational relationship exists between the ordinance and this government interest. [Citation.] In the case at hand, the district court's opinion notes only that the city 'has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight.' [Citation.] Upon careful review of the record in this case, we find no such 'assertion,' nor do we find *any evidence* of a legitimate government objective for the passage of this zoning ordinance." (*Christy v. City of Ann Arbor*, supra, 824 F.2d at p. 493, italics added.)

If a legislative body is constitutionally prohibited from zoning adult entertainment businesses absent findings that the ordinance is directed to ameliorating secondary effects, then a fortiori this court may not "legislate" a new standard absent a record from which it can be fairly inferred that such a standard will substantially serve the government objective.

The majority's incursion into the legislative realm is as unnecessary as it is mischievous. The majority complain that "[t]he exact basis of the *Pringle* decision is not entirely clear" while suggesting that it sets a constitutionally based regulatory floor for all localities in the state, i.e., that no city may constitutionally define an adult motion picture theater as a building used to exhibit anything less than 50 percent adult films, no matter what evidence is presented to the legislative body. (Maj. opn., *ante*, at p. 747, fn. 8 and p. 748, fn. 10 of 259 Cal.Rptr., at p. 776, fn 8 and p. 777, fn. 10 of 774 P.2d.) To the contrary, *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, did not purport to hold that its preponderance standard represented any sort of constitutional floor for adult entertainment zoning ordinances in general or that a local entity was precluded from adopting any definition of an adult theater that was

more restrictive than the preponderance standard.

Indeed, two Court of Appeal decisions cited by the majority make this point very clear. In *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 181 Cal.Rptr. 1, decided just one year after *Pringle*, the Court of Appeal applied the predominance standard in defining the proportion of a bookstore's stock that would render the store an "adult bookstore" for purposed of a similar zoning ordinance, but at the same time explicitly recognized that a local legislative body retained the authority to adopt an alternative standard, stating: "If the board of supervisors intended to allow a lesser portion it behooves them to quantify the phrase and make findings showing their figure is consonant with the governmental interest being protected." (128 Cal.App.3d at p. 376, 181 Cal.Rptr. 1.) And in *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 200 Cal. Rptr. 47, the Court of Appeal, while applying the *Pringle* standard to the version of a San Diego adult entertainment zoning ordinance before it, noted that the city council had amended the ordinance after the suit in that case had been filed to define an adult motion picture theater as a theater that presents sexually explicit films or shows "for viewing on more than 7 days within any 56-consecutive-day period," and stated approvingly that while "this provision is not in issue here, . . . we may observe it operates in aid of the Code's certainty." (148 Cal.App.3d at p. 889, fn. 9, 200 Cal.Rptr. 47.)

Thus, *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, should not be, nor has it been interpreted as preventing a city from holding public hearings and examining studies, based either on its own or other cities' experiences, and enacting an ordinance that explicitly defines adult motion picture theaters as those exhibiting

numerically more or less than a preponderance of adult films. At that point, a city may be in the correct posture to raise the claims Long Beach attempts to litigate in this case.

That the majority's "regular and substantial course of conduct" standard is vague and untailored to the governmental interest at stake is hardly surprising. It does not appear in the parties' briefs, in decisions of the courts below, or indeed, in any of the reported cases in this state. While, we cannot insist on "celestial precision," as the majority put it, because the ordinance touches on free speech rights and because violation of the ordinance can subject a theater owner to criminal penalties, both the locality's interests and constitutional values would be better served by a more precise definition of "adult motion picture theater" -- (see, e.g., *Strand Property Corp. v. Municipal Court*, supra, 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47) -- that is, a definition that can be understood and easily applied by all parties without engendering endless court controversy and without deterring constitutionally protected speech that poses no substantial danger of adverse secondary effects. The choice among a variety of reasonable, alternative standards that could be used to define an "adult motion picture theater" is clearly a legislative policy decision. The appropriate legislative body, not this court, is in the best position to assess the circumstances likely to create adverse secondary effects in its own community.

III

I must acknowledge that I share the majority's concern that the preponderance test *might* result in too high a standard. The solution, however, is not to invent a "regular and substantial course of conduct" standard, of

dubious context and unsupported by legislative findings. To do so is to usurp the legislative role. In my view the proper course is to allow municipalities, which "often employ planning experts who can prepare studies of the probable effects of a proposed zoning ordinance" (*Zoning*, op. cit. supra, 91 Harv.L.Rev. at p. 1560), to analyze, to consider and possibly to experiment with various standards and, most importantly, to create a record for judicial review. If an ordinance based on such a record is thereafter challenged, we would have a sound basis for determining whether the standard violates free speech principles.[2]

KENNARD, Associate Justice,
concurring and dissenting.

I.

I concur in the majority's conclusion that the Long Beach adult entertainment zoning ordinance at issue here cannot properly be interpreted to classify a theater as an "adult motion picture theater" within the meaning of the ordinance (Long Beach Mun. Code, § 21.51.020, subd.

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[2] It appears that the majority do not propose that their new standard should be applied retroactively to these defendants (see maj. opn., *ante*, at p. 748, fn. 11 of 259 Cal.Rptr., at p. 777, fn. 11 of 774 P.2d). Criminal prosecution based on the past conduct of defendants -- like the theater owners in this case -- who may well have conducted their theater's operations in reliance both on the *Pringle* decision and on subsequent California cases that followed *Pringle*, would undoubtedly raise serious ex post facto problems.

A.2.)[1] solely on the basis of the theater's single showing of a sexually explicit film. This conclusion would follow even under ordinary principles of statutory interpretation, without resort to constitutional considerations.

The ordinance in question is a zoning ordinance, not an obscenity ordinance. As the United States Supreme Court said in *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d 29, such an ordinance "is aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community." (Emphasis in original.)

"[It] is difficult to imagine that only a single showing ever, or only one in a year would have any meaningful secondary effects" on the community surrounding a motion picture theater. (*Tollis, Inc. v. San Bernardino County* (9th Cir. 1987) 827 F.2d 1329, 1333.) Therefore, it would not be reasonable to ascribe to the drafters of the Long Beach ordinance an intent to include a theater within the ordinance's "adult motion picture theater" category on the basis of a single showing of a sexually explicit film, particularly in the absence of any indication on the face of the ordinance or any legislative history suggesting such an intent. Thus, I concur in the majority's rejection of the city's contention that the

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[1] Section 21.51.020 provides in relevant part: "A. For purposes of this chapter, the adult entertainment businesses are defined as follows: " . . ."

2. 'Adult motion picture theater' means an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein."

ordinance embodies a "single use" standard.

II.

Like Justice Mosk, however, I cannot join in that portion of the majority opinion which goes beyond the city's "single use" contention and undertakes to fashion an entirely new standard for defining an "adult motion picture theater" for purposes of the Long Beach ordinance. In so doing, the majority discards the Court of Appeal's interpretation of a virtually identical provision in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251. This venture by the majority is, in my view, unwarranted.

In *Pringle*, the appellate court construed the challenged adult entertainment zoning ordinance as applying only to theaters which showed "a preponderance" of sexually explicit films. Other appellate courts have followed *Pringle* in interpreting similar zoning ordinances which did not contain a precise or definite standard for determining whether a theater or bookstore fell within the reach of the ordinance. (See, e.g., *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1; *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889-890, 200 Cal.Rptr. 47.)

During oral argument in this case, counsel for the city was asked several times whether, in the event the court disagreed with his "single use" contention, he was urging the court to interpret the ordinance as embodying some from of intermediate standard between a "single use" standard and *Pringle*'s "preponderance" standard. Counsel responded he was going "for broke," and he did in fact argue only for a "single use" standard. Under these circumstances, we should not devise a compromise

interpretation of our own design.

Also, in reaching out to overturn *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, the majority opinion ignores the fact that, in the span of eight years since that decision, the City of Long Beach has taken no action to modify the *Pringle* test. If, in the city's view, the "preponderance" standard is too easily evaded and does not adequately identify those theaters which produce detrimental secondary effects on the surrounding neighborhoods in its community, the city could have amended the language of its zoning ordinance to adopt an alternative, more stringent definition of adult theaters.[2] Both *Kuhns* and *Strand*, which were decided in 1982 and 1983, hold that a locality is free to adopt an alternative to the preponderance standard. (See *Kuhns*, supra, 128 Cal.App.3d at p. 376, 181 Cal.Rptr. 1; *Strand, supra*, 148 Cal.App.3d at p. 889, 200 Cal.Rptr. 47.) Indeed, the *Strand* decision specifically noted that the city of San Diego had opted for this approach in September of 1982,

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[2] Contrary to the implication in the majority opinion (see *ante*, p. 747 & fn. 8 of 259 Cal. Rptr., p. 776 & fn. 8 of 774 P.2d), there is nothing in *Pringle* which suggests that its "preponderance" standard represented any sort of constitutional "floor" for adult entertainment zoning ordinances in general. Although the *Pringle* court did hold that the term "used" in the ordinance at issue in that case could not constitutionally be interpreted to mean a "single use" (*Pringle, supra*, 115 Cal.App.3d at pp. 161-162, 171 Cal.Rptr. 251), the court did not in any way intimate that local entities were constitutionally prohibited from adopting any definition of an adult theater that was more restrictive than a preponderance standard. And, as noted hereafter in the body of my concurring and dissenting opinion, other courts have not interpreted *Pringle* as adopting such a restriction.

when it amended its adult entertainment zoning ordinance to specifically define an adult theater as one which exhibits the described type of sexually explicit films "'on more than 7 days within any 56-consecutive-day period.'" (See *Strand*, supra, 148 Cal.App.3d at p. 889, fn. 9, 200 Cal.Rptr. 47.)

Here, in discarding *Pringle*'s "preponderance" standard, the majority opinion fails to give adequate deference to the city's legislative prerogative.

Finally, there is an additional reason why we should leave to the city's legislative body the task of modifying the *Pringle* test. Under the somewhat indefinite "regular and substantial course of conduct" standard proposed by the majority, an ordinary theater (see, e.g., *Pringle*, supra, 115 Cal.App.3d at p. 153 & fn. 1, 171 Cal.Rptr. 251), which in good faith wished to comply with the law, may have difficulty in determining whether it may show a popular, nonobscene -- but sexually explicit -- film once a week, once a month, or even once every two months without facing criminal charges of having turned its theater into a prohibited "adult motion picture theater." Even if the majority's proposed standard is sufficiently definite to survive a constitutional vagueness challenge -- a question on which I would reserve judgment -- it still appears unwise to thrust such a standard on a locality which has not itself opted for such an opaque definition. As Justice Mosk observes, such a standard will inevitably engender "endless court controversy" (see ante, p. 753 of 259 Cal.Rptr., p. 782 of 774 P.2d) as to how many films must be shown over what period of time to satisfy the "regular and substantial course of conduct" test. Such litigation would ill-serve not only the administrative and financial interests of the locality but also the legitimate constitutional interests of theater owners and

theater patrons.

There are numerous methods by which a city could reasonably define the category of theaters whose presence is likely to have detrimental secondary effects on the surrounding community without creating the enforcement problems which are likely to arise under the majority's view. For instance, a city could define such a theater by reference to (1) the proportion of the theater's films which are sexually explicit, (2) the number of sexually explicit films which are shown at the theater each week, each weekend or each month, (3) the nature of the films which receive top billing on the theater's marquee or in its advertisements, or (4) the percentage of the theater's revenues which are attributable to the showing of sexually explicit films.

A local legislative body is better equipped than this court to determine, in light of local conditions, how best to identify those theaters which are likely to become a "blight" on the local community, and to frame a definition which local authorities can enforce and which will provide adequate guidance to those who wish to comply with the law.[3]

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[3] Unlike Justice Mosk, I do not read the governing federal decisions as requiring a local entity to point to specific empirical evidence to support its choice of one particular definition of "adult theater" over another. The lead opinion in *Young v. American Mini Theatres* (1976) 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310, makes it clear that a city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Of course, any definition which is chosen must not be "'a pretext for suppressing expression'" (see *Renton, supra*, 475 U.S. at p. 54, 106 S.Ct. at p. 932 [quoting *Young, supra*, 427 U.S. at p. 84, 96 S.Ct. at p.

Accordingly, although I concur in the majority's rejection of the city's "single use" contention and in the affirmance of the Court of Appeal judgment, I respectfully dissent from the majority opinion insofar as it ventures beyond the city's "single use" claim.

BROUSSARD, J., concurs.

2459 (Powell, J. conc.)]), but must be selected as a reasonable means of protecting the community from adverse secondary effects.

APPENDIX # 2

(Lucero II)

Lucero v. Municipal Court (People)
(1993) 15 Cal.App.4th 784
[19 Cal.Rptr.2d 143]--"depublished"
by order of the California Supreme
Court August 12, 1993

Jose Ronillo Abogado LUCERO, Jimmie Johnson, Walnut Properties, Inc., a California Corporation, Petitioners and Respondents

v.

MUNICIPAL COURT OF the LONG BEACH JUDICIAL DISTRICT, County of Los Angeles, State of California, Defendants.

PEOPLE of the State of California, Real Party in Interest and Appellant.

No. B050440.

Court of Appeal, Second District, Division 7.

May 7, 1993.

The Superior Court, Los Angeles Count, No. C715969, Jack M. Newman, J., awarded theater owners attorney's fees and costs under § 1988 as prevailing parties in writ proceedings to restrain criminal prosecution brought by city in violation of their constitutional rights. City appealed. The Court of Appeal, Johnson, J., held that: (1) theater owners were prevailing parties in proceeding to vindicate their civil rights for purposes of award of fees; (2) immunity did not shield city from paying fee award; (3) city was real party in interest to be held responsible for fee award even though city was not named in pleadings; and (4) award of fees under § 1988 was proper in action to restrain unconstitutional criminal proceedings.

Affirmed.

John A. Vander Lans, Long Beach City Prosecutor, Robert R. Recknagel, Asst. City Prosecutor, and Gerry L. Ensley, Deputy City Prosecutor, for real party in interest and appellant.

Fleishman, Fisher & Moest, Stanley Fleishman and David Grosz, Los Angeles, for petitioners and respondents.

Ira Reiner and Gil Garcetti, Dist. Attys. of Los Angeles County, Harry B. Sondheim, Head Deputy Dist. Atty., and Diana L. Summerhayes, Deputy Dist. Atty., for amicus curiae Appellate Committee of California Dist. Attys. Ass'n.

JOHNSON, Associate Justice.

The City of Long Beach appeals from an order of the superior court awarding respondents attorney fees and costs as prevailing parties in an action to restrain a criminal prosecution brought by the City in violation of their constitutional rights. We affirm.

FACTS AND PROCEEDINGS BELOW

Respondents, Jose Ronillo Abogado Lucero, Jimmie Johnson and Walnut Properties, Inc. (respondents), owned, operated or worked at the Lakewood Theater in the City of Long Beach. Some of the films shown at the theater were X-rated adult movies. In 1977 the City of Long Beach (City) adopted a "non-cluster" or "anti-skid row" ordinance prohibiting any adult entertainment business within 500 feet of residential areas or 1,000 feet of public schools or churches. (Long Beach Mun.Code, ch. 21.51.)

In December 1977, and shortly after the Lakewood Theater opened, the City instituted proceedings culminating in the revocation of Walnut Properties, Inc.'s (Walnut) operating license. Walnut sued the City to challenge the constitutionality of the ordinance. (*Walnut Properties v. City Council of Long Beach* (1980) 100 Cal.App.3d 1018, 1024, 161 Cal.Rptr. 411.) The Court of Appeal upheld the constitutionality of the ordinance and affirmed Walnut's misdemeanor convictions for operating an adult entertainment business in violation of the Long Beach ordinance.

Walnut thereafter reduced the number of adult movies shown at the theater to something at or under 50 percent. Based on a then recent Court of Appeal decision interpreting the constitutionality of zoning restrictions on adult entertainment, a theater could not be regulated as adult entertainment unless a "preponderance" of the films exhibited were of the adult variety. (*Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251) "Preponderant use" of an adult theater was thereafter defined as "over 50 percent." (*Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47.)

Nevertheless, the City attempted to prosecute Walnut and others for probation violations based on a single showing of an adult film. Walnut filed suit for declaratory and injunctive relief against the city council and the city prosecutor alleging the rights under 42 United Stated Code section 1983 and *Pringle*. Walnut successfully sought an injunction to restrain the criminal proceedings as well as attorney fees under 42 United Stated Code section 1988. On appeal, the City contended Pringle was *wrongly decided* and that a single showing of an adult film should be sufficient under the first

amendment to violate its ordinance. The Court of Appeal agreed it was constitutionally permissible to regulate a theater showing a single adult film and reversed the judgment and award of fees. (*Walnut Properties, Inc. v. Ussery* (1986 178 Cal.App.3d 186, 223 Cal.Rptr. 511 [opinion ordered not published in the Official Reports by order of the Supreme Court dated June 24, 1986 (B005781)].)

In September 1987, the Long Beach City Prosecutor charged respondents with 12 counts each of violation the City ordinance. Each count of the complaint was predicated upon a single showing of an adult movie on a specific date. Although aware the decision in *Ussery* was deprived of precedential value due to the decision's depublication, and that the "predominant use" of the Lakewood theater was not the exhibition of adult films and therefore did not violate the ordinance as interpreted under *Pringle*, the City filed the complaints to directly challenge *Pringle*'s "predominate use" standard.

Respondents demurred to the complaints contending they could not be prosecuted based on an unconstitutional interpretation of the Long Beach Zoning Ordinance, i.e., based on a single showing of an adult film. The Municipal Court of Long Beach overruled the demurrers and set the case for trial.

Respondents sought a writ of prohibition or mandate to compel the municipal court to sustain the demurrers and dismiss the complaints. Respondents stated the petition was brought pursuant to 42 United States Code section 1983, because the present prosecution, brought under color of state law, would deprive them of their rights under the First and Fourteenth Amendments as guaranteed by the

Constitution of the United States.

The superior court granted a peremptory writ of mandate commanding the municipal court to grant the demurrers with 30 days leave for the real party in interest to file amended complaints. In its order the court explained that "the proceedings against petitioners under the allegations of the complaints filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States Constitution. . . . ."

The City's prosecutors refused to amend the complaints and instead petitioned the Court of Appeal for a writ of mandate to compel the superior court to vacate its judgment.

The Court of Appeal denied the writ and rejected the City's contention a single showing of an adult film was constitutionally sufficient to make a theater an adult motion picture theater within the meaning of the City's zoning ordinance. The court denied the City's petition for writ of mandate because the complaints did not and could not allege, as required by the decision in *Pringle*, that the preponderance of films exhibited were distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specific anatomical areas as those terms are defined in the Long Beach Municipal Code. The Supreme Court granted the City's petition for review of the constitutionality of the City's "single use" standard.

The Supreme Court found the "single use" standard violated the first amendment. The court also found, however, the *Pringle* "predominate use" standard was unnecessarily high and was not constitutionally compelled. The court rejected both the "single use" and *Pringle*

standards for defining the conditions under which a theater may be permissibly regulated as an adult theater and adopted instead a "regular and substantial course of conduct" standard. (*People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 27, 259 Cal.Rptr. 740, 774 P.2d 769.) The court concluded that "The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional 'single use' standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal [denying the City's petition for writ of mandate to reinstate the complaint] is affirmed." (49 Cal.3d at p. 28, 259 Cal.Rptr. 740, 774 P.2d 769.) The court concluded that "The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional 'single use' standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal [denying the City's petition for writ of mandate to reinstate the complaint] is affirmed." (49 Cal.3d at p. 28, 259 Cal.Rptr. 740, 774 P.2d 769.)

Thereafter respondents filed a motion for an award of attorney fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. (42 U.S.C., § 1988.) After extensive briefing and argument from the parties, the superior court awarded respondents $35,000 in fees and $1,773 in costs to be paid by real party in interest, the City of Long Beach. The City appeals from the order, asserting the award is inappropriate as a matter of law in numerous respects.

DISCUSSION

I. RESPONDENTS WERE THE PREVAILING PARTIES IN THE PROCEEDINGS TO VINDICATE THEIR CIVIL RIGHTS.

[1] The City contends respondents are not entitled to attorney's fees because they received only a technical victory concerning the pleadings and did not receive any relief on the merits. The city argues because respondents could not be prosecuted under the *Pringle* "predominate use" theory, and could not be prosecuted on a "single use" theory, there has been no legal change between the parties to qualify respondents as the prevailing parties.

The leading case defining who can be deemed a "prevailing party" in a civil rights action, and therefore who is entitled to an award of fees under section 1988, is *Texas State Teachers Assn. v. Garland Independent School Dist.* (1989) 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866.[1] In that case the Court was asked to determine

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[1] 42 United States Code section 1983, the relevant civil rights statute, provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . .subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

42 United States Code section 1988, the Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

"In any action or proceeding to enforce a provision of § [] (1983), the Court, in its discretion, may allow the prevailing party . . . a

whether the teachers association could be deemed to be the prevailing party in the action although some of its claims were dismissed. The Court examined its decisions defining "prevailing parties" in varying contexts and determined "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit the plaintiff has crossed the threshold to a fee award of some kind . . . As we noted there, [r]espect for ordinary language required that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sough to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)] not to the availability of a fee award *vel non*." (489 U.S. at pp. 791-793, 109 S.Ct. at pp. 1492-1494, internal citations and quotation marks omitted.)

In this case the writ proceeding brought by respondents changed the legal relationship between the parties. Respondents sought a writ of prohibition or mandate to prevent any prosecution based on the unconstitutional charges. At the termination of all the

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reasonable attorney's fee . . . ."

All further statutory references are to Title 42 of the United States Code unless otherwise indicated.

writ proceedings, our Supreme Court issued its decision restraining the criminal prosecution. Thus, where once respondents were defendants threatened with a prosecution for alleged violations of a Long Beach Municipal Ordinance, at the end they were freed from having to defend against the unconstitutional charges.

Furthermore, respondents received some relief on the merits of their claim. Their petition for writ of prohibition or mandate alleged the criminal prosecutions would violate their rights under the First and fourteenth Amendments of the United States Constitution. The superior court, Court of Appeal and Supreme court agreed and the prosecution was restrained.[2]

It is true the City also received some benefit from the litigation in that the more stringent *Pringle* standard has now been replaced by a more lenient "regular and substantial course of conduct" standard for determining when an adult theater may be constitutionally regulated. However, that incidental, alleged benefit for prosecutors generally is irrelevant to the inquiry whether respondents, as the parties that pursued the writ proceedings pursuant to section 1983, were successful in restraining a

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[2] Based on the Supreme Court's conclusion, we reject the City's contention no court found respondent's constitutional rights had been violated.

Also, based on the plain and unambiguous language used in the petition, we reject the City's contention it had inadequate notice the writ was sought pursuant to section 198 and that it could, therefore, be liable for fees under section 1988. (See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* (1993) --- U.S. ---, 113 S.Ct. 1160, 122 L.Ed.2d 517 [there is no heightened pleading standard in civil rights actions].)

prosecution based on the City's unconstitutional standard of "single use."

II. NO IMMUNITY SHIELDS THE CITY FROM PAYING A FEE AWARD UNDER SECTION 1988 BECAUSE RESPONDENTS BROUGHT AN ACTION FOR PROSPECTIVE RELIEF UNDER SECTION 1983.

Relying on the decision in *Imbler v. Pachtman* (1976) 424 U.S. 409, 95 S.Ct. 984, 47 L.Ed.2d 128, the Long Beach City Prosecutor contends the award of fees was improper because prosecutors enjoy absolute immunity for actions taken in the official exercise of their discretion. The City contends if the prosecutor's office is immune from section 1983 liability there can be no fee shifting under section 1988.

This argument is inapplicable to the case at bar. *Imbler* provides absolute immunity to state prosecutors from personal liability in damages for malicious prosecution. Nor was the underlying action brought against the Long Beach City Prosecutors individually.

[2] Moreover, the doctrine of prosecutorial immunity is inapplicable in actions for prospective relief where the liability of the municipality for violations of civil rights is at issue and not that of the official personally (*Owen v. City of Independence* (1980) 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673) and where the fee award is to be paid by the governmental entity (*Hutto v. Finney* (1978) 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522). (See also *Kentucky v. Graham* (1985) 473 U.S. 159, 167, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 [in suit against municipal

officers personally, city cannot be held liable on respondeat superior theory although that defense unavailable where officials sued in official capacity.])

[3] In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.* (1980) 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, the Court held the Virginia court could be held liable for an award of fees under section 1988 in their role as the enforcement agents of the state bar rules. In so holding the Court noted "[p]rosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." (*Id.* at pp. 736-737, 100 S.Ct. at p. 1977, internal citation omitted.) After reviewing the cases holding the Eleventh Amendment did not bar an award of attorney fees against a state officer in his or her official capacity in a suit for injunctive relief in federal court (*Hutto v. Finney*, supra, 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-2579), the court stated: "Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees." (446 U.S. at p. 738, 100 S.Ct. at p. 1977.)[3]

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[3] The City suggests other bases for immunity from an award of attorney's fees. These contentions, however, have no merit. The Eleventh Amendment provides no immunity for an action brought in state court, especially where the liability of a municipality, and not a state, is at issue. Secondly, as the City concedes, state common law and statutory immunities do not pertain to a civil rights action brought under federal law. (See, e.g., Gov.Code, § 821.6; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 246 Cal.Rptr. 609.)

Contrary to the arguments of the City, the fee award against the City was proper because the writ proceeding in the present case was not an action for damages but was instead tantamount to a suit for declaratory or injunctive relief. As noted by one commentator: "Where the statute or ordinance is unconstitutional, there is no legally punishable offense, and the court has no jurisdiction to try the defendant. In such a case, a higher court will grant the equivalent of an injunction, namely a *writ of prohibition* to prevent the *lower court* from trying the defendant." (4 Witkin & Epstein Cal.Criminal Law (2d ed. 1989) Jurisdiction and Venue, § 1831, p. 2168, emphasis in original; see also, *Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 171 P.2d 8 [writ of prohibition proper vehicle to restrain prosecution based on unconstitutional statute]; *Patterson v. Municipal Court* (1965) 232 Cal.App.2d 289, 42 Cal.Rptr. 769 [prohibition to compel trial court to properly instruct on and give issue to the jury].)

Because the writ proceeding in the present case sought to restrain the unconstitutional criminal prosecutions, the proceeding was sufficiently akin to a suit for declaratory or injunctive relief to warrant an award of fees against the City for the unconstitutional actions of its enforcement officials.[4]

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[4] Because the present proceedings requested only prospective relief from the unconstitutional prosecution, we reject the City's argument respondents are not entitled to fees because they did not plead and prove damages and did not request findings of fact or conclusions of law regarding the City's history, custom and policy regarding its decision to construe its ordinance to be violated upon a single exhibition of an adult motion picture. In these proceedings, where the relief sought was to restrain the illegal criminal

III. RESPONSIBILITY FOR PAYING THE FEE AWARD MAY PROPERLY BE PLACED ON THE CITY ALTHOUGH NOT NAMED IN THE PLEADINGS.

[4] The City next contends the fee award against it was improper because only the People of the State of California were named as the real party in interest in the writ proceedings.[5]

However, it is sufficient if the course of the

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prosecution pursuant to section 1983, it was only necessary to demonstrate the City's prosecutor, under color of state authority, consciously decided to prosecute respondents based on a single showing of an adult movie and that the City's standard was constitutionally impermissible. (*Gomez v. Toledo* (1980) 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572.)

Any argument respondents failed to prove these elements, or that the City had not adopted as its policy the "single use" standard, would be disingenuous at best. As Justice Kennard noted in her concurring and dissenting opinion in *People v. Superior Court (Lucero), supra*, 49 Cal.3d at p. 35, 259 Cal.Rptr. 740, 774 P.2d 769, "During oral argument in this case, counsel for the city was asked several times whether, in the event the court disagreed with his 'single use' contention, he was urging the court to interpret the ordinance as embodying some form of intermediate standard between a 'single use' standard and *Pringle's* 'preponderance' standard. Counsel responded he was going 'for broke", and he did in fact argue only for a 'single use" standard."

[5] When the city prosecutor's office prosecutes misdemeanors committed within its jurisdictional territory, by statute it must do so in the name of the People of the State of California. (Gov.Code, §§ 36900, subd. (a), 41803.5.)

proceedings reveal the real party in interest for purposes of identifying the individual or entity against whom a fee award may be made. As the Court stated in *Brandon v. Holt* (1985) 469 U.S. 464, 471-472, 105 S.Ct. 873, 877-878, 83 L.Ed.2d 878: "In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit." Thus, in *Brandon v. Holt* the Court held the city was responsible for paying the attorney fees awarded to the prevailing plaintiffs in a section 1983 action against the city's director of police sued in his official capacity. (*Id.* at p. 471, 105 S.Ct. at p. 877.)

In *Hutto v. Finney*, supra, 437 U.S. 678, 98 S.Ct. 2565, the Court rejected the state attorney general's argument the state could not be responsible for attorney fees under section 1988 based on an action for injunctive relief where prison officials were the named defendants. "[T]he Attorney General argues that, even if attorney's fees may be awarded against a State, they should not be awarded in this case, because neither the State nor the Department is expressly named as a defendant. Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. [Citation] The State apparently paid earlier fee awards; and it was the State's lawyers who decided to bring this appeal, thereby risking another award.

"Like the Attorney General, Congress recognized

that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (*whether or not the agency or government is a named party*).' S.Rep. No. 94-1011, p. (1976)." *(Hutto v. Finney*, supra, 437 U.S. at pp. 699-700, 98 S.Ct. at p. 2578, italics added.)

Thus, whether or not the City was named as a real party in interest in this action is not determinative in ascertaining which person or entity should be responsible for the fees in this case. What is determinative is whether the course of proceedings reveal the real party in interest and whether that party had adequate notice of the suit and an opportunity to defend.

All the criteria for imposing the fee award against the City of Long Beach area met in this case. The entire controversy concerned the enforcement of Long Beach's zoning ordinance. The "singe use" standard was the city prosecutor's interpretation of the City ordinances. The city prosecutor's office has defended the ordinance and represented the City's interests in all proceedings at every level. The city prosecutor in fact brought this appeal to challenge the award of fees imposed against the City.

From this record it is clear the City had adequate notice of the proceedings and has had its interests represented throughout. The trial court found, and we agree, the City of Long Beach was the real party in interest in these proceedings to defend its ordinance. Under these circumstances, we find no violation of due process in requiring the Cit as the real party in interest in

this action to pay the award of attorney fees and costs.

IV. SECTION 1988 ATTORNEY'S FEE AWARDS MAY BE PROPERLY AWARDED IN ACTIONS TO RESTRAIN UNCONSTITUTIONAL CRIMINAL PROCEEDINGS.

[5] Amicus curiae suggests an award of attorney fees is improper when awarded in a proceeding which is part of a criminal prosecution. The argument, apparently, is that criminal defendants should not be allowed to bootstrap a civil proceeding which carries with it a potential for an award of fees into a criminal prosecution. Amicus curiae does not cite any relevant authority for this proposition. Nor do we see anything inherently improper in this process.

Apparently amicus curiae would prefer a criminal defendant to pursue his or her remedies in the criminal action and then later or simultaneously file a separate civil action under section 1983 for the civil rights violations inflicted in the criminal proceeding. We fail to see how a multiplicity of suits to accomplish the same objective can possible benefit either defendants, the justice system or further the congressional purpose of providing an effective statutory vehicle to vindicate civil rights secured by the Constitution. (See, e.g., *Lezama v. Justice Court* (1987) 190 Cal.App. 3d 15, 24, 235 Cal.Rptr. 238 [to be entitled to fees under section 1988, criminal defendants should pursue available remedies in the original proceeding].)

We agree an award of fees under section 1988 may not be proper for the fees and costs incurred in defending a criminal prosecution. (*Perkins v. Cross* (8th Cir.1984) 728 F.2d 1099; *Greer v. Holt* (6th Cir.1983) 718 F.2d 206.)

However the fees in this case were neither incurred nor awarded for that purpose. In this case there was no actual prosecution to try the alleged charges. Consequently, there were no fees or costs incurred in defending against the improper charges. The purpose of these proceedings was not to secure or defend against a conviction but rather to restrain an unconstitutional prosecution before it could begin.

[6, 7] In any event, the language of section 1988 does not limit an award of fees to separately filed civil actions only. As the Supreme Court noted in *Hutto v. Finney*, supra, 437 U.S. at p. 694, 98 S.Ct. at p. 2575: "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." The legislative history of The Civil Rights Attorney's Fees Awards Act of 1976 supports a broad interpretation as well. The Senate Report on the Act states: "It is intended that, the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statues covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*,390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)." (S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin.News. (1976) pp. 5908, 5912.) [6]

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[6] The City does not specifically allege special circumstances render the award of fees unjust. However, the City inferentially suggests an award would be unjust because its actions were in good faith and brought about a change in the law. Neither circumstance qualifies as a "special circumstance" prohibiting an award of fees.

These same arguments were presented and rejected in *Wilson v. Stocker* (10th Cir.1987) 819

In these writ proceedings, respondents sought to enforce their rights not to have to defend against unconstitutional charges. It would appear the broad language of section 1988 should encompass proceedings prompted by an impending criminal prosecution as well as actions for declaratory or injunctive relief brought for the same purpose. (Compare *Wilson v. Stocker* (10th Cir.1987) 819 F.2d 943 [arrestee properly awarded attorney's fees against district attorney and attorney general in action for declaratory and injunctive relief to restrain threatened criminal prosecution].)

[8] Instructive on this point is the decision by

F.2d 943. "We there pointed out that '[f]ee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.' [Citations] Here, . . . the alleged special circumstances amount to no more than assertions that the Attorney General has acted in good faith, a ground overwhelmingly rejected by the courts. [Citations] Allowing the circumstances offered by the Attorney General here to justify denial of attorney's fees would conflict with controlling case law and defeat the purpose of section 1988, which is not designed to penalize defendants but to encourage injured individuals to seek relief. [Citation.] . . .

"The District Attorney's assertion that fees are unjust because her participation in the litigation helped develop the law and the facts is also unpersuasive. A party to litigation almost always aids in such development. Accepting this assertion as a special circumstance would render a fee award unjust in virtually every case, a result undeniably contrary to the congressional intent that fee awards be 'an integral part of the remedies necessary' to obtain compliance with the civil rights laws. See S.Rep. No. 1011, 1976 U.S.Code Cong. & Admin.News at 4913." (*Wilson v. Stocker, supra*, 819 F.2d at pp. 951-952.)

our Supreme Court in *In re Head* (1986) 42 Cal.3d 223, 228 Cal.Rptr. 184, 821 P.2d 65. The issue in that case was whether prison inmates were properly awarded attorney's fees for a successful challenge to prison conditions brought in habeas corpus proceedings. The attorney fee provision in that case was Code of Civil Procedure section 1021.5, the private attorney general provision, which only provided for an award of attorney's fees if several stringent requirements are met. Although not controlling authority in an action involving an award of fees under the expansive federal civil rights statute, the principles that decision announce guide us to a proper resolution of this issue.

In *In re Head*, supra, 42 Cal.3d 223, 228 Cal.Rptr. 184, 721 P.2d 65, the Department of Corrections challenged the award contending fees were only appropriate in civil proceedings. The Supreme Court disagreed. In rejecting the parties' attempt to characterize the proceedings as either criminal or civil the court concluded: "We shall conclude that the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under section 1021.5. The petitions here presented issues related to the conditions of confinement in a state prison and involved the rights of prison inmates generally. Vindication of these rights is not analogous to a defense against a criminal prosecution. Rather, as respondent conceded, the petitioner's claim is of such a nature that it might have been presented in a purely civil proceeding --- by petition for writ of mandate or action for declaratory relief --- in which case no question would be raised as to the propriety of the award. That petitioners elected to utilize the more expeditious, simplified and less expensive procedure of habeas corpus to vindicate their rights, should not affect the availability of a fee award." (*In re*

Head, supra, 42 Cal.3d at p. 226, 228 Cal.Rptr. 184, 721 P.2d 65.)

The court noted attorney's fees are often awarded in mandate proceedings brought by criminal defendants. (See, e.g., *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 184 Cal.Rptr. 78 [to prevent sentencing of misdemeanor defendants in absentia]; *Daniels v. McKinney* (1983) 146 Cal.App.3d 42, 193 Cal.Rptr. 842 [to vindicate right of prison inmates to exercise].) In conclusion, the court stated: "How the party achieves the goal of enforcing the right is not determinative of the right to an award of attorney fees under section 1021.5. The impact of the litigation is." (*In re Head*, supra, 42 Cal.3d at pp. 228-229, 228 Cal.Rptr. 184, 721 P.2d 65.)

In this case respondents could have brought a separate civil action for declaratory or injunctive relief. They instead took the less expensive, more expeditious route of availing themselves of remedies within the original proceeding. Whether this writ proceeding may be characterized as civil or criminal is not significant. Instead it should be recognized for what it is; an original, extraordinary proceeding brought to assert their constitutionally guaranteed civil rights.

In sum, we believe permitting an award of fees for the vindication of constitutional rights in writ proceedings arising from an attempted criminal prosecution is consistent with Congress' intent to authorize such awards to a prevailing party in "any proceeding" which successfully enforces those rights.

DISPOSITION

The award of attorney fees and costs is affirmed. Respondents to recover their costs of appeal.

LILLIE, P.J., and FRED WOODS, J., concur.

APPENDIX # 3

Order of California Supreme Court, August 12, 1993, denying hearing and "depublishing" Lucero II

Second Appellate District, Division Seven, No. B050440
S033385

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOSE RONILLO ABOGADO LUCERO Et Al., Respondents

v.

MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DIST., Respondent

THE PEOPLE, Real Party In Interest

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed May 7, 1993, which appears at 15 Cal.App.4th 784. (Cal. Const., Art. VI, Section 14, rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

SUPREME COURT: **FILED**, Aug 12, 1993, Robert Wandruff, Clerk.

APPENDIX # 4

Respondents' original
Petition for Writ of Prohibition
and/or Mandate in Lucero I

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners	NO.C632880
vs.	PETITION FOR WRIT OF PROHIBITION AND/OR MANDATE
MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Respondent.	
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

INTRODUCTION

1. Petitioners bring this action to restrain proceedings in, or to compel the dismissal of, three criminal prosecutions under the Long Beach "adult entertainment" zoning ordinance that are proceeding in flagrant violation of controlling law. Pringle v. City of Covina, 111 Cal. App. 3d 153, 171 Cal. Rptr. 251 (1981), held that an ordinance that prohibits a movie theater to be "used for presenting" "adult" films in certain areas of a city can, constitutionally, apply only when the "Use "is a predominant one. It held that it would be unconstitutional for a theater to be barred under such an ordinance for a single showing of an "adult" film.

2. In the face of this holding, the present prosecutions have been brought explicitly under the single-showing standard. Petitioners here demurred to the complaints, but the demurrers were overruled, and the cases may now be set for trial. Moreover, the petitioners are at risk of multiple prosecutions arising out

of each's day's normal operation of a movie theater. It is therefore necessary that relief be granted by this court.

3. This petition is brought pursuant to 42 U.S.C. § 1983 (1982). By the underlying criminal proceedings, petitioners are being subjected to the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution of the United States, and particularly the first and fourteenth amendments.

4. Each exhibit hereto is a true and correct copy of what it purports to be and is incorporated in this petition by reference as if fully set forth.

PARTIES

5. Petitioners Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc., are, and at all times mentioned in this petition were, the defendants in three related criminal cases now pending in respondent court, People v. Johnson, Lucero , and Walnut Properties, Inc., Nos M230180, **M120181 [sic**

M230181], M230182. Walnut Properties, Inc. (Walnut), is a California corporation that owns and operates the Lakewood Theater, located at 4501 East Carson Boulevard, City of Long Beach, County of Los Angeles, State of California. At all times mentioned Jimmie Johnson was the president of Walnut and Jose Ronillo Abogado Lucero was an employee of Walnut.

6. Respondent Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, is now, and at all times mentioned in this petition was, executing judicial functions in each of the criminal cases mentioned above.

7. Real party in interest People of the State of California is, and at all times mentioned was, the plaintiff in each of the criminal cases mentioned above.

FACTS

8. The petitioners are each charged with twelve counts of violation of section 21.51.030 of the Long Municipal Code. The complaints in the Lucero,

Johnson, and Walnut cases are Exhibits A, B, and C, respectively, hereto. The relevant text of chapter 21.51 is Exhibit D hereto. Each count consists of an allegation that a particular "X-rated movie" was shown at the Lakewood Theater on a particular day, and that the theater is located within 500 feet of a residential zone, 1,000 feet of a public school, and 1,000 feet of a "religious organization."

9. In Pringle v. City of Covina, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981) (Exhibit E) the court of appeal held that an ordinance, with language substantively identical to that of section 21.51.030 would, on its face, be impermissibly vague. Pringle held that the ordinance must be narrowly construed to meet constitutional requirements and could apply only to theaters presenting a "preponderance" of films which are "adult" films within the meaning of the ordinance.

10. Prior to Pringle, on or about June 20, 1978, Walnut and its then president, Vincent Miranda, were

charged in the respondent court with establishing in a zone permitting "motion picture theaters," an "adult motion picture theater," contrary to the provisions of the Long Beach adult zoning ordinance (Section 9120.41 of the Long Beach Municipal Zoning Ordinance). Johnson was not a party to that action. Walnut and Miranda were found guilty and were placed on summary probation upon the condition that the Lakewood Theater not be operated as an "adult theater." Also prior to Pringle, the Appellate Department of the Superior Court affirmed the conviction. People v. Walnut Properties, Inc., No CRA 16846 (Cal. Super. Ct. App. Dep't July 1, 1980).

11. After Pringle was decided, on or about May 22, 1981, the City Prosecutor of Long Beach charged that Walnut and Miranda had violated the terms of probation by exhibiting certain adult films on May 1, 2, 7 and 8, 1981, at the Lakewood Theater.

12. On September 22, 1983, the probation violation

hearing was heard before the Honorable Kirk Gustafson. During the course of the probation violation hearing, it was stipulated, in substance, that the total adult film exhibition time never exceeded the non-adult film exhibition time at the Lakewood Theater. Following now the constitutionally required definition of "adult theater" set forth in Pringle, Judge Gustafson held that there was no violation of the provisions of probation. The People appealed. The Appellate Department affirmed. People v. Walnut Properties, Inc., No. CRA 21481 (Cal. Super. Ct. App. Dep't Mar. 18, 1985) (Exhibit F). The Appellate Department stated:

> Notwithstanding the holding of the Court of Appeal in Pringle, supra, the city attorney for the City of Long Beach has argued at considerable length, both in the trial court, and in this court, that a single showing of an adult film by respondent constitutes a violation of the provision of the probation of respondent prescribing that the Lakewood Theatre not be operated "as an adult motion picture theater." The city attorney argues that Pringle is "clearly wrong", entitled to no weight, and that it should be declared

> unconstitutional by this court. We note, however, that a petition for hearing by the Supreme Court with respect to Pringle was denied on March 25, 1981.
>
> We further note that Pringle has been approved by three subsequent Court of Appeal decisions.

The City filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 15, 1985. California v. Walnut Properties, Inc., 106 S. Ct. 230 (1985).

13. On June 13, 1981, shortly after Walnut and Miranda were charged with violating probation, they filed a complaint, Case No. C 369 631, in the Los Angeles Superior Court for injunctive and declaratory relief alleging that the Lakewood Theater was not an adult theater within the meaning of Pringle. The superior court concluded that plaintiffs were entitled to injunctive and declaratory relief, and entered judgment declaring that the city's ordinance "cannot be enforced except in the context of Pringle . . . . Unless a preponderance of

the films exhibited by plaintiffs are adult films as that term is defined in Pringle, the theater is not an adult theater within the meaning of the Long Beach municipal code section."

14. The court of appeal reversed. Walnut Properties, Inc. v. Ussery, 178 Cal. App. 3d Adv. Sh. 186, 223 Cal Rptr. 511 (1986) (Exhibit G). That court concluded that Pringle was wrongly decided, and that a single exhibition of an adult film converted a theater into an adult theater. Walnut (Miranda in the interim having died) filed a petition for review in the California Supreme Court. The court denied review but ordered that the opinion of the court of appeal not be published in the official reports.

15. Pursuant to rule 977(a) of the California Rules of Court, the appellate opinion in Ussery was deprived of precedential value, and, accordingly, the rule enunciated in the published Pringle opinion remains binding

throughout the state.

16. The Long Beach City Prosecutor nevertheless initiated and is pursuing the prosecutions now pending in the respondent court, even though he knew that the activities of the petitioners did not and could not meet the preponderance standard of Pringle. The complaints allege that a single showing of an "X-rated" movie in a particular location violated the Long Beach ordinance.

17. The petitioners filed demurrers to the complaints. The demurrers are substantively identical. Exhibit H is the demurrer of Lucero. The real party in interest opposed the demurrers, Exhibit I, petitioners filed a reply memorandum , Exhibit J, and the real party in interest a "supplemental opposition," Exhibit K.

18. After hearing, the respondent court, on November 18, 1986, overruled the demurrers. The transcript of the hearing is Exhibit L.

BASES OF RELIEF

19. When the demurrers were overruled, respondent court indicated its intention to proceed to trial on the three cases, which action would be in excess of respondent's jurisdiction in that trial of this matter is precluded by the first and fourteenth amendments and article I, section 2, of the California constitution, and by the authoritative rule of law enunciated in Pringle. The above-described action of respondent was also unreasonable, arbitrary, and prejudicial abuse of discretion, and violated a plain duty imposed on respondent by law.

20. The alleged activities on which the criminal cases are based are protected by the first amendment and by article I, section 2, of the California Constitution. On its face and as applied and interpreted by real party in interest and respondent, the Long Beach ordinance violates the right guaranteed by those provisions. The criminal complaints fail to state any public offense, in

particular because they allege that the Long Beach ordinance was violated by a single showing of a film, and do not and cannot allege that the Lakewood Theater shows a preponderance of "adult" films.

ABSENCE OF OTHER REMEDIES

21. Petitioners have no right of appeal from respondent's decision and order of November 18, 1986, nor a plain, speedy and adequate remedy at law other than the relief sought in this petition.

IRREPARABLE INJURY

22. As a result of the action described above, unless the further proceedings in the actions in respondent court are not restrained and prohibited or unless respondent is compelled to perform its legal duty and sustain the demurrers filed by petitioners, petitioners will be irreparably injured in that the exercise of their right of freedom of speech will be chilled and denied, and they are threatened with a multiplicity of prosecutions

arising from the normal and lawful operation of a motion picture theater.

WHEREFORE, petitioners pray that:

1. An alternative writ of prohibition and/or mandate issue under the seal of this court commanding respondent court to desist and refrain from taking any further action or proceedings, including trial, in the criminal actions above described until further order of this court, and directing respondent and real party in interest to show cause before this court, at a time and place then or thereafter specified by court order, why respondent should not be absolutely and forever restrained from any further proceedings in the actions; and to sustain the demurrers filed by petitioners or to show cause before this court, why it has not done so and why a peremptory writ should not issue; and

2. On return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition

issue under the seal of this court restraining respondent absolutely and forever from taking any further proceedings in the actions and compelling respondent to sustain the demurrers filed by petitioners; and

3. Petitioners recover their attorney's fees; and

4. Petitioners recover the costs of this action; and

5. The court grant such other and further relief as may be just and proper.

Dated: January 20, 1987

Respectfully submitted,

Fleishman, Fisher & Moest

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By:_____
David Grosz

Attorneys for petitioners

APPENDIX # 5

Judgment for Peremptory
Writ of Mandate

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
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Los Angeles, California 90067

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Respondent.	NO.C632880 JUDGMENT FOR ISSUANCE OF PEREMPTORY WRIT OF MANDATE
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

The matter came on regularly for hearing

before this court on May 14, 1987, in the courtroom of the Honorable Jack M. Newman, Judge, pursuant to the verified petition of Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc.

David Grosz, of Fleishman, Fisher & Moest, appeared as attorney for petitioners, and Gerry L. Ensley, Deputy City Prosecutor, City of Long Beach, Appeared as attorney for real party in interest.

Real party in interest having filed an answer to the petition, each side having submitted memoranda of points and authorities in support of their respective contentions, exhibits having been received in evidence and examined by the court, arguments having been presented and the cause submitted for decision, the court having determined that, pursuant to controlling authority, the proceedings against petitions under the allegations of the complaints filed in the respondent court subject the petitioners to a deprivation of rights

secured by the first and fourteenth amendments to the United States Constitution and article I, section 2, of the California Constitution, and the court having directed that judgment and a peremptory writ of mandate should issue in the cause,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that: respondent immediately upon receipt thereof to grant the demurrers filed by the petitioners herein in the actions now pending before it entitled The People of the State of California v. Walnut Properties, Inc., Jimmie Johnson, and Jose Ronillo Abogado Lucero, Nos. M 230180, M 230181, and M 230182, with 30 days leave for the real party in interest to file amended complaints in said actions.

Dated: August 5, 1987

_____

Judge of the Superior Court

Judgment entered on _____,

1987, Vol. _____ of the Judgment Book, page

_____.

_____

Clerk

By _____

Deputy Clerk

APPENDIX # 6

Respondents' Request for
Attorney's Fees pursuant to
42 U.S.C. § 1988, commencing
Lucero II

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
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Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation,	NO. C632880
Petitioners	MOTION OF PETITIONERS FOR ORDER AWARDING ATTORNEY'S FEES (42 U.S.C. § 1988)
vs.	
MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,	
Defendants.	
THE PEOPLE OF THE STATE OF CALIFORNIA	
Real Party in Interest.	

Petitioners move for an order awarding them attorney's fees, against the people of the state of California (City of Long Beach), real party in interest, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

The motion is based of the ground that petitioners are the prevailing party in this proceeding brought pursuant to 42 U.S.C. § 1983 (1982) and that no special circumstances exist that would render an award of fees unjust.

The motion is based on this motion, all papers and records on file herein, the declarations of Stanley Fleishman, David Grosz, and Stuart L. Kadison, the memorandum of points and authorities served and filed herewith, and on such other and further matters as may be presented at or before the hearing of the motion. Petitioner specifically reserves the right to supplement this motion with respect to further time

and costs expended.

The declarations and papers in support of this motion establish the following fees of Stanley Fleishman $29,547 and of David Grosz $16,410, so that petitioner is entitled to fees in the lodestar amount of $45,957; and out-of-pocket expenses of $1,773.85. The total amount sought on this motion is, therefore $47,730.85.

Dated: October 23, 1989

Respectfully submitted,

Fleishman, Fisher, & Moest

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By: _____
David Grosz
Attorneys for Petitioner

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Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants. THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	NO. C632880 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)

I.

INTRODUCTION.

On January 20, 1987, the petitioners Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc., filed, pursuant to 42 U.S.C. § 1983 (1982), a petition for writ of mandate restraining criminal actions brought against them by the Long Beach City Prosecutor. Long Beach had asserted against each petitioner twelve counts of violation of Long Beach, Cal., Municipal Code § 21.51.020, the city's "adult entertainment " zoning ordinance. Petitioners asserted that the ordinance, as construed in the criminal complaints, was unconstitutionally broad inasmuch as the complaints alleged that the exhibition of a single adult film made the theater an "adult theater" within the meaning of ordinance.

This court granted the writ. It determined that, pursuant to controlling authority, the proceedings

against petitioner under the allegations of the complaint filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States constitution and article I, section 2 of the California Constitution.

Judgment for Issuance of Peremptory Writ of Mandate at 2 (Aug. 5, 1987).

The city then sought review by way of a writ of mandate from the court of appeal to compel this court to vacate its judgment.[7]/ The court of appeal denied the petition on September 9, 1987. On November 18, 1987, the supreme court granted the city's petition for review, and transferred the case back to the court of appeal to issue an alternative writ. After argument,

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[7]/ The superior court's grant or denial of a writ to a municipal court is not appealable, but is subject to discretionary review by the appellate court on a petition for a writ. Cal. Civ. Proc. Code § 904.1(a) (West Supp. 1989).

the court filed its opinion, denying the city's petition. People v. Superior Court (Lucero), 198 Cal. App. 3d 1038, 244 Cal. Rptr. 502 (1988).

The supreme court again granted review and heard the case on the merits, with full briefing and argument. It, too, held the city's "single-use" theory unconstitutional, and it affirmed the judgement of the court of appeal. People v. Superior Court (Lucero), 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989).

The judgment of this court is now final. Petitioners accordingly move for attorney's fees against the City of Long Beach for the case pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

II.

PETITIONERS, AS PREVAILING PARTIES IN THIS 42 U.S.C. § 1983 PROCEEDING, ARE ENTITLED TO A FEE AWARD UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT, 42 U.S.C. § 1988.

The Civil Rights Attorney's Fees Awards Act of 1976 provides in pertinent part that "[i]n any action or proceeding to enforce . . . section[] . . . 1983 . . . of the title . . ., the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982). The statute applies in state courts equally as in federal courts. E.g., Filipino Accountants' Ass'n v. State Bd. of Accountancy, 155 Cal. App. 3d 1023, 1031, 204 Cal. Rptr. 913, 917 (1984).

The legal principles that shape the structure of section 1988 are well established, and have been thoroughly considered in California cases.

While section 1988 gives a trial court discretion in

deciding whether to award attorney fees to a prevailing party, that discretion is narrowly limited. (Bonnes v. Long (4th Cir. 1979) 599 F.2d 1316, 1318.) The controlling standard is that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (Newman v. Piggie Park Enterprises (1968) 390 U.S. 400, 402 [19 L. Ed. 2d 1263, 1266, 88 S. Ct 964].) Section 1988 requires a strong showing of special circumstances to justify denying an award of attorney fees to the prevailing party in a section 1983 claim. (Riddle v. National Democratic Party (5th Cir. 1980) 624 F.2d 539, 543.) McMahon v. Lopez, 199 Cal. App. 3d 829, 836, 245 Cal. Rptr. 172, 177 (1988). All the statutory requisites are met here.

First, this proceeding was brought to enforce 42

U.S.C. § 1983 (1982), [1]/ and therefore is a proper case for a section 1988 award. The petition specifically alleged that it was "brought pursuant to 42 U.S.C. § 1983 (1982)," since, "[b]y the underlying criminal proceedings, petitioners are being subjected to the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution of the United States, and particularly the first and fourteenth amendments." Petition for Writ of Prohibition and/or Mandate at 2, para. 3. As noted above, the writ granted by this court specified that the

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[1]/ Section 1983 provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

42 U.S.C. § 1983 (1982), quoted in McMahon v. Lopez, 199 Cal. App. 3d at 835 n.2, 245 Cal. Rptr. at 175 n.2.

petitioners were being denied their first and fourteenth amendment rights, a conclusion upheld by the court of appeal and the supreme court.

Second, petitioners are clearly the prevailing parties in this proceeding within the meaning of section 1988. "'[P]laintiffs may be considered "prevailing parties" for attorney' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" Sokolow v. County of San Mateo, 213 Cal. App. 3d 231, 242, 261 Cal. Rptr. 520, 529 (1989) (emphasis in the original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983)). Here, petitioners entirely succeeded in achieving the benefit they sought. The supreme court ultimately held that each alleged violation in the criminal actions was "based on the unconstitutional 'single use' standard," and that the city was "not entitled to proceed with the

action as pleaded." People v. Superior Court (Lucero), 49 Cal. 3d at 28, 774 P. 2d at 777, 259 Cal. Rptr. at 748.

Finally, there are no "special circumstances" here that would render a fee award unjust, much less the "strong showing" necessary to deny an award to a prevailing plaintiff. Courts have rejected in carload lots proffered claims of "special circumstances" in highly analogous cases. See, e.g., EWAP, Inc. v. City of Ontario, 177 Cal. App. 3d 1108, 1115-18, 223 Cal. Rptr. 422, 427-30 (1986) (fee award under section 1988 to "adult" bookstore that succeeded in its challenge to an "adult uses" zoning ordinance); see also, e.g., Sokolow v. County of San Mateo, 213 Cal. App. 3d at 245, 261 Cal. Rptr. at 528 (no special circumstances where plaintiffs "were successful in vindicating and enforcing" a "vital constitutional right," there, of equal protection).

III.

"LODESTAR" FEES SHOULD BE AWARDED FOR ALL TIME EXPENDED BY PETITIONERS' ATTORNEYS, CALCULATED AT THE ATTORNEYS' REASONABLE HOURLY RATES.

"The criteria for the calculation of attorney's fees are the same under both" section 1988 and the state public interest fee awards act, Cal. Civ. Proc. Code § 1021.5 (West 1987). Green v. Obledo, 161 Cal. App 3d 678, 683, 207 Cal. Rptr. 830, 832 (1984). "[S]tatutorily authorized fees are computed on the basis of the reasonable market value of the services rendered . . . ." Serrano v. Unruh (Serrano IV)., 32 Cal. 3d 621, 643, 652, P.2d 985, 999, 186 Cal. Rptr. 754, 768 (1982).

The "fundamental"' principle in calculating the amount of the award is to "determine a 'touchstone' or 'lodestar' figure based on a 'careful compilation of the time spent and reasonable hourly compensation for each attorney . . . involved in the presentation of the

case.'" Press v. Lucky Stores Inc., 34 Cal. 3d 311, 322, 667 P.2d 704, 710, 193 Cal. Rptr. 900, 906 (1983). (quoting Serrano v. Unruh (Serrano III), 20 Cal. 3d 25, 48, 569 P.2d 1303, 1316, 141 Cal. Rptr. 315, 328 (1977)).[2]/

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[2]/ The court may increase the "lodestar" or "touchstone" amount "depending on other factors involved in the lawsuit." Maria P. v. Riles, 43 Cal. 3d 1281, 1294. 743 P.2d 932, 940, 240 Cal. Rptr. 872, 880 (1987). The facts the trial court may consider in adjusting the lodestar figure include

> "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the facts that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded inure not to the individual benefit of which the attorneys involved but the organizations by which they are employed . . . ."

20 Cal. 3d at 49, 569 P.2d at 1316, 141 Cal. Rptr. at 328; accord, Serrano III, Maria P., 43 Cal. 3d at 1294 n.8, 743 P.2d at 940 n.8, 240 Cal. Rptr. at 880 n.8. Petitioners here, however, request only

Thus, "absent special circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." Serrano IV, 32 Cal. 3d at 639, 652 P.2d at 997, 186 Cal. Rptr. at 766 (footnote omitted). These hours should be assessed at "prevailing hourly rates as the basis for the reasonable market value of lawyers' services." Id. at 640, 652 P. 2d at 997, 186 Cal. Rptr. at 766.

In this case, the petitioners have submitted evidence supporting the hours worked and rates claimed: Stanley Fleishman, 84.42 hours at $350 per hour = $29,567 and David Grosz, 82.05 hours at $200 per hour = $16,410. The total lodestar fees are therefore $45,957. This amount is clearly justified.

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the lodestar amount.

The number of hours invested in the proceeding was reasonable. The case presented important legal issues, and a need for an expeditious hearing to preserve the rights of stake. By the time it was over, it involved hearings and briefs at three levels of the judicial system. The concentration of effort by petitioner's counsel was vindicated by the outcome of the case. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will cover all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940 (1983).

The hourly billing rates of petitioners' counsel are also reasonable. These rates are entirely commensurate with the particularized experience and expertise of counsel as described in their declarations

and in that of Stuart L. Kadison, a former president of the Los Angeles County Bar Association and Governor of the California State Bar.

The requested rates of $350 per hour for Mr. Fleishman and $200 per hour for Mr. Grosz, attorneys with considerable experience in public law litigation, are entirely reasonable.

As noted above, under Serrano IV, the time spent in securing the fee award itself is fully includible in the calculation on the same basis as time spent of the merits. Hence petitioners reserve the right to seek additional compensation for any additional time spent in meeting opposition to this motion.

Finally, plaintiffs, are also entitled to recover "all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. H. 12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan). There is "unanimous

federal circuit court authority that the attorneys' reasonable and necessary costs and expenses may be awarded to a prevailing party pursuant to 42 U.S.C. § 1988." Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983) (per curiam) (collecting cases). [A]wards of such costs--costs that are ordinarily billed to a client--" including, for example, "telephone calls, postage, air courier and attorney travel expenses," are "routine under . . . fee statutes." International Woodworkers Local 3-98 v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985).

IV.

CONCLUSION.

Attorney's fees should be awarded to petitioners pursuant to 42 U.S.C. § 1983 (1982) for all time expended by petitioners' attorneys at their reasonable hourly rates and for their out-of-pocket expenses.

Dated: October 23, 1989

Respectfully submitted,

Fleishman, Fisher & Moest
Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By: _____
David Grosz

Attorneys for petitioners

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Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants.	NO. C632880 DECLARATION OF STANLEY FLEISHMAN IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

Stanley Fleishman, declares as follows:

1. I am an attorney for petitioners herein and make this declaration in support of petitioner's motion for attorney's fees pursuant to 42 U.S.C. § 1988. I have personal knowledge of the facts stated herein and could and would testify competently thereto if called upon to do so.

2. I am an attorney at law and am a member of the bars of the state of California and New York and of the United States Supreme Court.

3. I am a senior partner in the firm of Fleishman, Fisher & Moest. I have been the lead attorney in this matter and have retained the final authority for the conduct of the case, although David Grosz, a colleague in my firm, was assigned to handle many tasks in the case. For most of my practice, I have specialized in civil rights litigation, with an emphasis on First Amendment rights and rights of disabled

people. While still in New York, I filed an amicus curiae brief in James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944), a leading California Supreme Court civil rights case.

4. I orally argued the following cased in the United States Supreme Court: Alberts v. California [Roth v. United States], 345 U.S. 476, 77 S.Ct. 1304 (1957); Austin v. Kentucky; [Redrup v. New York], 386 U.S. 757, 87 S.Ct. 1414 (1967); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723 (1964); Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959); United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974); Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281 (1975); Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680 (1973); See also, e.g., Carlisle v. Landon, 73 S.Ct. 1179 (Douglas,

Circuit Justice, 1953); Stanard v. Olesen, 74 S.Ct. 768 (Douglas, Circuit Justice, 1958).

5. Additionally, I prevailed in the United States Supreme Court after filing a petition for writ of certiorari, but before argument, in the following cases: Aday v. United States, 338 U.S. 447, 87 S.Ct. 2095 (1967); Books, Inc. v. United States, 388 U.S. 449, 87 S.Ct. 2098 (1967); Corinth Publications, Inc v. Wesberry, 388 U.S. 448, 87 S.Ct. 2096 (1967); Felton v. Pensacola, 390 U.S. 340, 88 S.Ct. 1098 (1968); Quantity of Copies Books v. Kansas, 388 U.S. 452, 87 S.Ct. 2104 (1967); Rabeck v. New York, 391 U.S. 462, 88 S.Ct. 1716 (1968); Smith v. California, 375 U.S. 259, 84 S.Ct. 361 (1963).

6. I orally argued the following cases in the California Supreme Court: Aday v. Superior Court, 55 Cal.2d 789, 13 Cal Rptr. 415 (1961); Burton v. Municipal Court, 68 Cal.2d 856, 16 Cal.Rptr. 889 (1961); Burton

v. Municipal Court, 68 Cal.2d 684, 68 Cal.Rptr. 721 (1968); Flack v. Municipal Court, 66 Cal.2d 981, 59 Cal.Rptr. 872 (1967); Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 833 (1971); People v. Rossi, 81 Cal.3d 295, 134 Cal.Rptr. 64 (1976).

7. I argued the case of State v. Jackson, 224 Ore. 337, before the Oregon Supreme Court. I argued the case of Quantity of Copies of Books v. State, 191 Kan. 13, 379 P.2d 254, before the Kansas Supreme Court.

8. I argued the following cases, inter alia, in various United States Courts of Appeals: Toberoff v. Summerfield, 245 F.2d 360 (9th Cir. 1957); 256 F.2d (9th Cir. 1958); Oreson v. Standard, 227 F.2d 785 (9th Cir. 1955); Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Grant v. United States, 380 F.2d 748 (9th Cir. 1967); Corsican Productions v. Pitchess, 388 F.2d 441 (9th Cir. 1964); Steiner v. Hocke, 272

F.2d 384 (9th Cir. 1959); Luros v. United States, 490 F.2d 76 (5th Cir. 1974); United States v. Outpost Dev. Co., 552 F.2d 566 (9th Cir. 1977).

9. I appeared as attorney of record in the following cases, inter alia, in the United States District Courts: Cinema Classics Ltd. v. Busch, 339 F.Supp. 43 (C.D. Cal.) (three-judge court), aff'd mem. sub nom. Davis v. Cinema Classic, Ltd., 409 U.S. 807, 93 S.Ct. 105 (1972): LeBaron v. Olesen, 125 F.Supp. 53 (S.D. Cal. 1954); United States v. Linetsky, Crim. No 39798 (E.D. Mich.); In re Lousiana News Co., 187 F.Supp. 241 (E.D. La. 1960); Barrows v. Reddin, 301 F.Supp. 575 (C.D. Cal. 1971); United States v. Bloom, No. 7144-WJF (C.D. Cal. 1971); Door v. Pitchess, No. 63-15-PH (C.D. Cal. 1963); Elysium, Inc. v. Olesen, No. 63-385-PH (C.D. Cal. 1963); United States v. Frew, 187 F.Supp. 500 (E.D. Mich. 1960); United States v. Frew/Laning, Crim. No. 39414 (E.D. Mich. 1963);

Alegret v. Arnebergh, Civ. No. 70-170-ALS (C.D. Cal. 1970); United States v. Arno, No. CR 70-224 (D. Ariz. 1971); Rizzi v. Blount, 305 F.Supp. 634 (C.D. Cal. 1969).

10. The cases mentioned in paragraphs 4 and 9 above, are all in the First Amendment field. I also have extensive experience in litigating matters involving the rights of disabled people. I am an adjunct professor of law at Southwestern University School of Law where I teach a course on Constitutional Litigation--The Rights of Disabled People. In connection with that course I co-authored an unpublished book entitled Manual for Litigation: Rights of Disabled People. I have actively litigated a large number of cases involving Section 504 of the Rehabilitation Act. See, e.g., Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I); Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir.

1985) (Kling II), rev'd, No. 85-295 (U.S. Nov. 4, 1985); Pomerantz v. County of Los Angeles, 674 F.2d 1288 (9th Cir. 1982); Rose v. United States Postal Serv. 725 F.2d Adv. Sh. 1250 (9th Cir. 1984); Williams v. United States, 704 F.2d 1162 (9th Cir. 1983); California Ass'n of the Physically Handicapped, Inc. v. FCC, 742 F.2d 667 (9th Cir. 1983); California Paralyzed Veterans Ass'n v. FCC, 496 F.Supp. 125 (C.D. Cal. 1980); California Ass'n of the Physically Handicapped, Inv. v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Westside Community for Independent Living v. Obledo, 33 Cal.3d 348, 188 Cal.Rptr. 873.

11. I have kept detailed contemporaneous time records in this case, true copies of which are attached to this declaration as Exhibit A and incorporated herein by this reference. The time reflected on these records was reasonable and necessary to be expended in order to represent petitioners in this

matter. Among other things, I argued this case in the Court of Appeal, and briefed and argued it in the Supreme Court. As set out in the attached time sheets, my total expenditure of attorney time in this action, through the date of this declaration, is 84.42 hours. A reasonable rate for my services is $350 per hour. Accordingly, a reasonable attorney's fee award in this action for my services would be $29,547.00.

12. Fleishman, Fisher & Moest has reasonably expended $1,773.85 in out-of-pocket expenses in this matter, as set out in the schedule of expenses, attached hereto as Exhibit B and incorporated herein by this reference.

13. As set forth above, the firm presently constituted as Fleishman, Fisher, & Moest emphasizes public interest law and particularly specializes in First Amendment and civil rights issues. The areas of law which comprise the firm's practice are diverse and

include land use and environmental law, immigration, tax, and freedoms of press, speech and religion. The firm has litigated in nearly every federal circuit, has appeared before the United States Supreme Court on several occasions, and has served as chief counsel on numerous reported decisions.

14. Accordingly, this court should award reasonable attorney's fees for my services in the instant case commensurate with the fees customarily charged for major civil litigation services. In my opinion that amount would be $29,547.00, plus expenses of $1,773.85.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

Stanley Fleishman

020587 044.01F SF .25
Conf. w/DG, RCM re: order for new brief.
070887 044.01F SF .17
Conf. w/SF re possibility of attorney fees.
081187 044.01F SF .17
Conf. w/DG re strategy.
090987 044.01F SF .58
Strategy conference w/BAF on options regarding writ petition filed by prosecutor.
020988 044.01F SF 4.25
Conf. w/DG re argument; prep. for argument.
021088 044.01F SF 4.00
Ct. of app. argument.
021888 044.01F SF .33
Conf. w/BAF, DG re request for publication.
033188 044.01F SF .17
Conf. w/DG.
062888 044.01F SF 3.00
Review of record and file.
062988 044.01F SF 3.00
Complete review of record and file.
063088 044.01F SF 7.00
Research - petitioner's cases.
070188 044.01F SF 7.00
Research, federal and state law re: adult zoning.
070588 044.01F SF 5.00
Research prior restraints and single showing.
070688 044.01F SF 4.00
Research equal protection and due process.
070788 044.01F SF 3.00
Draft outline of brief.
070888 044.01F SF 5.00
Draft brief.
071188 044.01F SF 6.00

Review and edit of brief.
071488 044.01F SF 6.00
Final revision and edit.
071988 044.01F SF 1.00
Final check of brief.
040389 044.01 SF
5.50 Research.
040589 044.01 SF
2.00 Research.
040789 044.01 SF
6.00 Research and preparation for argument.
041089 044.01 SF
6.00 Research and preparation.
041189 044.01 SF
5.00 Preparation and argument.

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
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Los Angeles, California 90067
(213) 557-1077

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants.	NO. C632880 DECLARATION OF DAVID GROSZ IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

David Grosz declares as follows:

1. I am an attorney admitted to practice before this court. I am a member of the firm of Fleishman, Fisher, & Moest and am one of the attorneys for the Petitioners in this matter. I researched and drafted the writ papers filed in the Superior Court, argued the writ in the Superior Court, prepared the papers supporting the present motion, and performed numerous other tasks in connection with the litigation.

2. I have kept detailed contemporaneous time records in this case, true copies of which are attached to this declaration as Exhibit A and incorporated herein by this reference. The time reflected of these records was reasonable and necessary to be expended in order to represent the petitioners in this matter. As set out in the attached time sheets, my total expenditure of attorney time, properly billable, in this case, through the date of his declaration is 82.05

hours. My reasonable and normal attorney's billing rate is $200.00 per hour. Accordingly, a reasonable attorney's fee award in this action for my services would be $16,410.00.

3. I graduated in 1970 from the Massachusetts Institute of Technology in Cambridge, Massachusetts, with Bachelor of Science degrees in economics and philosophy. I received my legal education at the University of California, Los Angeles, from which I graduated in 1975 with a J.D. degree.

4. I was admitted to practice before the courts of the States of California and New York in 1976. I am also admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Eight, Ninth, Eleventh, and District of Columbia Circuits and the United States District Court for the Central District of California.

5. My studies and activities in law school and my

practice since that time have been concentrated in the areas of civil rights law and litigation. While a law student, I participated in a full-time externship with NAACP Legal Defense and Educational Fund, Inc., in San Francisco, California, where I worked with William Bennett Turner and other attorneys on litigation involving employment and housing discrimination, prisoner's rights and related fields.

6. After admission to the bar, I engaged in the private practice of law an emphasis on employment discrimination and other federal civil rights litigation. E.g., Clayton v. McDonnell-Douglas Corp., 584 F.2d 980 (9th Cir. 1978), vacating mem. 419 F.Supp. 18 (C.D. Cal. 1976). In early 1978, I joined the Law Offices of Arthur S. Ecker, in Beverly Hills, California, where I practiced civil litigation. Durilg this time, I was also co-counsel for a intervening party in the Los Angeles, California, school desegregation litigation

that culminated with Crawford v. Board of Education, 458 U.S. 527 (1982).

7. In September, 1978, I became associated with the firm now constituted as Fleishman, Fisher & Moest of Los Angeles, California which specializes in civil rights and other areas of non-commercial litigation. I have practiced with the firm since that time, except that, for the academic year 1988-89, I accepted an appointment and served as Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago Law School. I have participated during my association with Fleishman, Fisher, & Moest in the litigation of numerous public law cases in many jurisdictions, including the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits, numerous federal district courts in all parts of the country, and California state courts. E.g., Board of Airport Commissioners v. Jews for Jesus, Inc., 482

U.S. 569 (1987); Larson v. Valente, 456 U.S. 228 (1982); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376 (9th Cir. 1988); Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985); Inification Church v. INS, 762 F.2d 1077 (D.C. Cir. 1985); International Soc'y for Krishna Consciousness v. Air Canada, 727 F.2d 253 (2d Cir. 1984); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982); Edwards v. Maryland State Fair & Agric. Soc'y, 628 F.2d 282 (4th Cir. 1980); Walker v. Wegner, 624 F.2d 60 (8th Cir. 1980);International Oceanic Enterprises v. Menton, 614 F.2d 502 (5th Cir. 1980); International Soc'y for Krishna Consciousness v. Collins, 609 F.2d 151 (5th Cir. 1980); Holy Spirit Ass'n for the Unification of World Christianity v. Alley, 604 F.2d 669 (5th Cir.

1979); International Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667 (7th Cir.), cert. denied, 444 U.S. 963 (1979); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984); Greater Los Angeles Council on Deafness v. Zolin, 607 F.Supp. 175 (C.D. Cal. 1984), aff'd in part, rev'd in part, 812 F.2d 1103 (9th Cir. 1987); Westfall v. Board of Commr's., 477 F. Supp. 862 (N.D. Ga. 1979)' Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985); Tiernan v. Trustees of the Cal. State Univ. & Colleges, 33 Cal. 3d 211, 655 p.2d 317, 188 Cal. Rptr. 115 (1982); Friends of Westwood v. City of Los Angeles, 191 Cal. App 3d 259, 235 Cal. Rptr. 788 (1987); El Patio v. Permanent Rent Control Bd., 110 Cal. App. 3d 915, 168 Cal. Rptr. 276 (1980); Perlman v. Municipal Court (People), 88 Cal. App. 3d 568, 160 Cal. Rptr. 567 (1979). I have participated in

amicus curiae briefs in Riley v. National Fed'n of the Blind, 108 S.Ct. 2267 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 44 U.S. 620 (1980); Chess v. Widmar, 635 F.2d 1310 (8tj Cir. 1980), aff'd sub. nom. Widmar v. Vincent, 454 U.S. 263 (1981).

8. Accordingly, this court should award reasonable attorney's fees for my services in the instant case commensurate with the fees customarily charged for major litigation services.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

_____

David Grosz

010787 351.08 G
.50 Conf. w/SF re writ.
010987 351.08 G
.33 Conf. w/SF re strategy.
011487 351.08 G
.25 Conf. w/RCM re procedure.
011587 351.08 G
1.33 Preliminary research re writ petition.
011587 351.08 G
1.33 Research re writ.
011687 351.08 G
3.25 Research res judicata, Pringle case law.
011687 351.08 G
3.25 Research & drafting of writ petition.
011887 351.08 G
6.17 Research and drafting re writ petition.
011987 351.08 G
5.83 Draft and revise petition & memorandum.
012887 351.08 G
2.75 Review writ opposition; draft reply.
012987 351.08 G
.83 Revise reply brief; conf. w/SF.
020587 044.01F G 3.08
Draft brief ordered by court.
020687 044.01F G 4.25
Draft brief per court order.
021187 044.01F G 2.25
Revise brief re court order; review opp. brief.
021287 044.01F G 1.25
Review opposition brief.
051387 044.01F G 2.08
Preparation for hearing on writ.
051487 044.01F G 3.50

Travel; hearing on writ - Dept. 70; conf. w/SF.
051787 044.01F G 1.17
Prepare judgment, writ.
051887 044.01F G .42
Conf. w/SF; revise papers to be submitted after decision.
070887 044.01F G .42
Conf. w/RCM re new writ req. by judge.
071087 044.01F G 1.05
Draft new judgment and writ requested by judge.
081187 044.01F G .33
Review judgment; conf. w/SF re strategy.
081387 044.01F G .33
Service of writ; letter to G. Ensley.
090787 044.01F G 2.67
Research re propriety of writ, procedure for answer, preliminary review of writ.
090987 044.01F G .42
Letter to J. Johnson.
091187 044.01F G .25
Conf. w/BAF re denial of writ.
092287 044.01F G .67
Review petition for review.
092387 044.01F G .58
Call w/R. Garrou re recent cases; letter to J. Johnson.
121887 044.01F G .33
Revise motion for extension of time.
122987 044.01F G 2.83
Research re court response.
123087 044.01F G 2.67
Research re collateral estoppel, drafting of response to writ.
123187 044.01F G 2.42
Response to writ.
120187 044.05F G .50
Review alt. writ; calls w/Cal.App. & Judge Newman's

clerk re response.
010488 044.05F G 1.67
Draft answer.
010588 044.05F G 1.83
Opp. to writ.
010688 044.05F G 1.17
Opp. to writ.
010788 044.05F G 6.50
Draft opp. to writ.
020988 044.01F G 1.17
Review reply brief; conf. w/SF re argument.
021888 044.01F G .50
Review decision; conf. w/SF, BAF re request for publication.
021988 044.01F G 1.08
Draft letter requesting substitution.
022988 044.05F G .17
Letter to J. Johnson re publication order.
033088 044.01F G .92
Preliminary review of pet. for review.
033188 044.01F G .33
Conf. w/SF; letter to J. Johnson re pet. for review.
041288 044.01F G .17
Call w/JJ re decision not to answer petition for review.
101888 044.01F G 3.17
Draft motion, memo re atty fees; call w/Dept. 70 clerk re filing.
101988 044.01F G 1.83
Declarations re atty fees motion
102088 044.01F G 2.25
Revise papers re fee motion.

LUCERO vs. MUNICIPAL COURT
RECAP OF COSTS

January 87		
	Telephone charges	3.87
	Copier (260 @.20)	52.00
	Postage	5.48
	Messenger service	51.50
	Secretarial overtime	47.71
		160.56
February 87		
	Secretarial overtime	17.44
	Telephone charges	4.08
	Copier (428 @.20)	85.60
	Messenger service	19.00
		126.12
May 87		
	transcript of 5/14 Writ	10.00
	5/14 courthouse parking	7.75
	Mileage 60 mi RT @.25	15.00
32.75		
June 87		
	Copier usage (13 @ .20)	2.60
		2.60
August 87		
	Telephone charges	2.23
		2.23
December 87		
	Filing fees (2 briefs)	464.00
	Copier usage (1153 @ .20)	230.60
	Telephone charges	6.23
	Postage - brief mailing	10.15
	Messenger service	87.75
		798.73
January 88		
	Federal express	11.00

	Copier usage (832 @ .20)	166.40
	Telephone charges	10.96
	Messenger service	40.00
	Secretarial overtime	251.21
	Quickprint (covers)	2.66
		482.23
July 88		
	Copier usage (629 @.20)	125.80
	Lloyds attorney service	37.50
	Outside copying	5.33
		168.63
Total costs		1,773.85

Stuart L. Kadison declares as follows:

1. I am an attorney at law. I make this declaration in support of petitioners' motion for attorney's fees. I have personal knowledge of the facts stated herein and could testify to them competently if called upon to do so.

2. I was admitted to the State of California State Bar in 1948 and have practiced continuously in the greater Los Angeles area since then. I am a partner in the Los Angeles office of Sidley & Austin, a Chicago-based, national law firm.

3. I received my undergraduate education at New York in 1942. I attended the law schools of the University of Maryland and Stanford University, receiving an LL.B. degree in 1948. At the University of Maryland, I was a member of the Board of Editors on the Law Review. I have been a lecturer in law at Southwestern University and Stanford University Law

Schools. I was a member of the Board of Trustees of the Los Angeles County Bar Association from 1966 to 1972, and served as President of the Association in 1971-72. From 1973 to 1975, I was Chairman of the Special Committee on Delivery of Legal Services of the American Bar Association. I was a member of the board of Governors of the State Bar of California from 1973 to 1976. I am a member of the American Law Institute and a Fellow of the American College of Trial Lawyers and the American Bar Foundation. I am an experienced attorney in the Los Angeles area.

4. I have known Stanley Fleishman for more than forty years and have the highest regard for him personally and professionally. I am familiar with Mr. Fleishman's work. He is an outstanding litigator and appellate lawyer. He has handled many important cases in the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit and the

California Court of Appeal. He has been a major moving force in the development of first Amendment law.

5. Mr. Fleishman's professional reputation in the community is excellent. The September 11, 1989 issue of the Los Angeles Daily Journal, §III, had an article on Mr. Fleishman and his firm. The article quotes Alfred T. Goodwin, Chief Judge of the United States Court of Appeals for the Ninth Circuit as saying: "After regularly appearing before me over a period of 30 years, Mr Fleishman is one of the few lawyers I can say I never found wanting in professional skills or anything else. It's obvious Mr. Fleishman believes in his clients and the issues he brings before the court. He is always professional, well prepared, and just feisty enough to keep things interesting." The article also refers to an order made by Judge Manuel Real, Chief Judge of the United

States District Court for Central District of California, stating that Mr. Fleishman is "recognized as one of the premier constitutional attorneys in this district."

6. I am familiar with attorney's fees in the greater Los Angeles area. Attorneys with Mr. Fleishman's reputation, experience and skill regularly charge $350 an hour and upwards working in an area of their expertise. I believe a rate of $350 an hour for Mr. Fleishman is fair and reasonable in this case, which involved first amendment issues in a central area of Mr. Fleishman's experience.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

Stuart L. Kadison